

Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?

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INTRODUCTION: THE ADJUDICATORY LANDSCAPE AS VIEWED
FROM THREE SCHWARTZ LECTURES

This article was prepared in conjunction with a conference on "Court Reform Implications of Dispute Resolution," which began with Judge Jack B. Weinstein's 1995 Schwartz Lecture¹ and continued with three panel discussions and two additional presentations. Speaking near the close of the program provided an opportunity to attempt to synthesize observations made earlier in the conference, which built upon prior dispute resolution scholarship. Despite the frequent debate surrounding alternative dispute resolution ("ADR") and litigation, sufficient consensus exists to outline at least a tentative roadmap for the next stage of judicial implementation of ADR.

My formal presentation topic: "Should Courts Be Reformed to Adopt Features of Alternative Dispute Resolution ("ADR")?"² seems at first glance to be simultaneously daunting, rhetorical, and moot. The topic is moot and rhetorical to the degree that courts have already adopted many features of ADR in their operation.³ Although one might conclude that this has all been a mistake and that this "ADRization" of the courts should be

¹ See generally Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996).

² At the risk of nitpicking, I want to define terms and emphasize my preference for referring to means of conflict resolution other than traditional adjudication as "ADR" rather than "DR" or dispute resolution. The latter term is occasionally used by advocates to connote or contend that litigatory adjudication should not be regarded as primary while nonjudicial means are viewed as secondary options. For example, the brochure for this Symposium referred to "Dispute Resolution" (although every participant I can recall spoke of "Alternative" Dispute Resolution).

At the risk of being politically incorrect, I can not help but refer to dispute resolution methods and systems other than litigation as "alternative." Speaking of only "DR" rather than "ADR" can serve to subconsciously remind the world, particularly the legal profession, that litigation is not the be-all and end-all of conflict management. But that nomenclatural point pretends that the dispute resolution movement of the past 20 years has no history. Its history is a reaction to the perceived excesses and shortcomings of litigation. It does not demean the modern dispute resolution movement to keep this in mind, but rather helps us to better assess social change by gauging the growth of ADR in comparison to traditional adjudication.

³ By ADR methods or features, I mean techniques or processes for administering and attempting to conclude controversies that differ in some significant fashion from classical litigatory adjudication (e.g., a "full dress trial," as Justice Marshall once referred to it in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)) or its immediate auxiliaries (e.g., conclusion of the case by pretrial motion or stipulated settlement in open court).

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jettisoned as soon as possible, the practicalities of court pressure, public preference, and political power ensure that ADR in some form will be part of the judicial system for at least the foreseeable future.⁴ In the remainder of this century and the beginning of the next, there will be no return to the "pure" or "classic" adjudicatory model that existed prior to the 1970s.⁵

⁴ See *infra* note 21 and accompanying text (discussing federal legislation endorsing, encouraging, or mandating ADR). In addition, Congress has acted in recent years to strengthen the enforcement of and deference to arbitration agreements. See, e.g., 9 U.S.C. § 15 (1994) (providing for interlocutory review of judicial refusal to compel arbitration, but not for similar review of trial court orders compelling arbitration). The courts have shown similar solicitude for arbitration but have stopped short of empowering courts to demand litigant participation in some forms of ADR absent some indicia of voluntariness. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring arbitration of age discrimination claim on the strength of boilerplate arbitration clause in which worker was required to sign as prerequisite to employment); *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993); *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987) (courts may not require parties to participate in mandatory summary jury trial).

On the less tangible political front, criticism of full-scale adjudication seems to have struck a responsive chord with the public. ADR promotion and a curtailment of traditional adjudicative activity forms a significant part of the Republican party's "Contract With America" and the "Common Sense Legal Reform Act" that is part of the legislative package of the Contract. See Garrett M. Moore and Stephen Jacques, *Personal Injury and Insurance: Getting a Hold on Tort Reform*, CONN. L. TRIB., June 19, 1995, at S24. Former vice president Dan Quayle's attacks on lawyers and the legal system were well-received by the public if not the legal establishment. See Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313, 325-26 (1993).

Philip Howard's *THE DEATH OF COMMON SENSE* (1994) was widely reviewed, praised, and perceived as an attack on traditional legal thought, which by implication includes adjudication. But Howard's more subtle work can be readily differentiated from much of the lawyer bashing of the past decade, and praised discretion in decisionmaking, a trait of the judicial approach to ADR suggested in this article.

Although different elements of the legal community debate the extent of docket congestion and its impact on dispute resolution, there is no denying that caseloads are large and have grown substantially in the past decade. For example, between 1960 and 1990, federal case filings increased more than threefold (from 87,421 to 264,409). See COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 11 (Draft for Public Comment, Nov. 1994).

⁵ Although the ADR movement may not have supplanted the judicial/adjudicatory paradigm of dispute resolution, the new ADR era has certainly brought extensive modifications. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling*

Thus, for better or for worse, the courts and ADR are commingled. More difficult questions remain, making the topic of judicial absorption of ADR daunting because it encompasses questions such as:

(a) What types of ADR mechanisms or approaches are appropriate for judicial incorporation?

(b) What ADR techniques are best left to privatization?

(c) What degree of supervision should courts exercise over private ADR?

(d) What ADR methods should be tightly regulated, discouraged, or even prohibited by the court?

The nature of judicially embraced ADR—not merely its presence or absence—is important. Some forms of ADR annexation can assist the judiciary while others can detract from optimal conflict resolution in society. Some forms of extra-judicial ADR are useful but require judicial enforcement for support. Other ADR methods are problematic and deserve a wary judicial eye. Now that ADR has its beachhead on the judicial shore, the next phase of the movement requires additional experimentation, learning, and selection of the appropriate court reaction to different forms of ADR.

Without a doubt, ADR has ridden a crest of popularity that at times resembles a fad.⁶ The excited but uninformed embrace of ADR by some

Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 BROOK. L. REV. 659, 662-64 (1993) (reviewing changes in political and public sentiment toward adjudication and development of modern ADR movement).

Even that most hallowed Anglo-American institution, the jury, is under attack, an attack that has reached the pages of America's most mainstream periodicals. *See, e.g.,* Marilyn Vos Savant, *Should We Change the American Jury System? Parade Readers Respond*, PARADE MAG., July 30, 1995, at 12 (responses to informal poll sponsored by "Ask Marilyn" column overwhelmingly urge elimination, curtailment, or modification of jury system and imply similar dissatisfaction with full-dress, adjudicative, and adversary proceedings). In addition to criticizing the jury system, Americans appear to be fleeing it in record numbers. *See* Andrea Gerlin, *Jury-Duty Scofflaws Try Patience of Courts*, WALL ST. J., Aug. 9, 1995, at B1 (citizen unwillingness to serve on juries hampers courts).

⁶ *See* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) [hereinafter Nader, *Controlling Processes*]. Nader's subsequent summary of her views on ADR as groupthink in response to criticism captures the point with more pith than I can manage:

[*Controlling Processes*] focused mainly on why the ADR advocates, the people who followed the initial innovators, were so uncritical. *Controlling Processes* proposed that coercive harmony and, more generally, harmony ideology (something which the

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elements of society, including the supposedly flinty-eyed business community, continues to remind me of the now-classic American movie, *The Graduate*, which starred a then-young Dustin Hoffman as Benjamin Braddock, the movie's protagonist. At a party thrown by his parents to celebrate his college graduation, Ben is pressed with trite career advice by one of his father's overbearing friends.⁷ "Plastics," whispers the would-be mentor, as if he has just told Ben to get in on the initial public offering for Wal-Mart.

article distinguished from the non-hegemonic uses of harmony) produces an environment which discourages critical thinking, and which furthermore strips people of their rights as underwritten in our less than perfect judicial system. In other words, like the judicial system, ADR has problems. But unlike the judicial system, these problems and flaws are not made public for the many reasons cited in *Controlling Processes*.

Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 101 (1994) [hereinafter Nader, *A Reply to Professor King*]. See also, Stephen G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993) (arguing against dangers of communal groupthink and enforced behavior).

Of course, many disagree with this view. See, e.g., Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65 (1994). My own view is that Nader's explanation of the popularity of ADR in the post-Pound Conference period is correct in identifying the rise of ADR and the legal elite's groupthink toward ADR, but overstates the insidious osmosis of social control and harmony ideology. The excessively rosy picture sometimes painted about ADR reminds me at least as much of the honeymoon enjoyed by fads, novelties, and seemingly fresh movements as it does a drive by opinion makers to enforce a harmony of ideology. Criticism normally does not take wide root until the second stage of a movement. Where the movement is pure fad, the second stage criticism may quickly become ridicule and effectively end the fad. Because ADR has survived this second stage, it is now becoming more an institution than a fad.

In addition, Nader seems to gloss over the substantial criticism consistently leveled at the ADR movement by herself and others such as Judith Resnik and Owen Fiss (see *infra* notes 11-20 and accompanying text) which suggests that many have indeed been critical of ADR. See also NATIONAL CENTER FOR STATE COURTS STATE JUSTICE INSTITUTE, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: RESEARCH FINDINGS; IMPLICATIONS FOR THE COURTS; FUTURE RESEARCH NEEDS (1994) (Susan Keilitz ed., 1994) (summarizing range of studies of ADR programs, many of which have been critical). To be sure, most of the critical comments come from the academic community while most of the boosterism comes from the business and political communities. This may be consistent with the Nader thesis, but hardly suggests that social views toward ADR have been uniformly uncritical.

⁷ Ben is also pressed by his overbearing father, William Daniels, who later became an overbearing heart surgeon in the classic television series *St. Elsewhere*.

Perhaps I simply need to get to the theatre more often and acquire more contemporary cinemagraphic images,⁸ but ADR and its endorsements continue to remind me of the emerging plastics industry lauded by Dustin Hoffman's buffoonish advisor in *The Graduate*. ADR clearly has been a growth industry, and is unlikely to decline or disappear regardless of the particular products produced by the industry in the future.⁹ However, the exact future of the industry remains unclear, particularly regarding the success of individual ADR initiatives. The bulk of the public and the legal profession have embraced ADR even if they are not quite sure what it is or how it should be deployed at the margin.

Like any trend, ADR has its skeptics and even some opponents. Considerable debate exists regarding the degree to which the increasing ADRization of traditionally judicial activity amounts to triumph or tragedy, a point well-illustrated by the past Schwartz Lectures. In the 1993 Schwartz Lecture, Professor Laura Nader described the ADR movement as a byproduct of society's attempt to suppress or conceal uncomfortable conflicts.¹⁰ In the 1994 Lecture, Professor Judith Resnik essentially concluded that the modern ADR movement has brought a regrettable de facto closing of the court house (or at least raised barriers to entry) and replaced reflective decisionmaking about claims and controversies with mere dispute processing.¹¹ In the 1995 Lecture, Judge Jack B. Weinstein recognized and seemed to share many of Resnik's concerns, but essentially put forth a more optimistic view of the increasing hybridization of American adjudication.¹²

My assessment falls somewhere between their theses but also differs in ways apart from the degree to which one celebrates or mourns the decline of traditional adjudication. Like others, I regard the Nader and Resnik theses as too pessimistic. Although it may be a bit unfair to label them "litigation

⁸ Perhaps the better movie analogy of the intersection of adjudication and ADR is *PULP FICTION*, *SPECIES*, or *WATERWORLD*, but as this article suggests, although I am frequently cynical I am not altogether pessimistic.

⁹ Ben's parents' friends may have been maladroitness (except, I suppose, for Mrs. Robinson) but that does not mean they were wrong. In the quarter-century since this movie was released, uses of plastic products have indeed multiplied and appeared in new areas (e.g., shrink wrap, rollerblade wheels, children's jungle gyms). Whether some users of these products would have been better off sticking with tradition is quite another question (I enjoy picking my own vegetables from a pile in the produce section, but as this article suggests, I am something of a traditionalist).

¹⁰ See Nader, *Controlling Processes*, *supra* note 6, at 1-3.

¹¹ Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

¹² See Weinstein, *supra* note 1, at 246-47.

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romanticists" (as have some commentators),¹³ they may overestimate the accuracy, fairness, and wisdom of traditional adjudication.¹⁴ But Resnik's analysis in the 1994 Schwartz Lecture and other writings, which consistently highlight the dark side of the ADR movement (and the general move away from adjudication), serve as an antidote to ADR bandwagonism and should give reasonable observers pause before rushing to dismantle the existing judicial structure. But even if Resnik's criticisms of the trend toward what might be termed "disadjudication"¹⁵ are correct, judicial adaptation to the Zeitgeist on which the ADR movement rides will probably be a more productive means of preserving core adjudicatory functions than would a strategy of massive resistance or despair.¹⁶

Thus, like Weinstein,¹⁷ Resnik,¹⁸ and others,¹⁹ I see ADR as having

¹³ See, e.g., Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 604 (1994).

¹⁴ Certainly, this criticism can be made of Nader's 1993 Schwartz Lecture, which argued that "Mandatory Mediation [or ADR] abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view." Nader, *A Reply to Professor King*, *supra* note 6, at 101; see also Nader, *Controlling Processes*, *supra* note 6, at 12. Although Nader's insights relate to and reflect upon many of the observations made by Resnik and Weinstein, a commentary on her central thesis lies beyond the scope of this article, which assumes the continued growth of ADR and focuses on the most effective forms of judicial interaction with ADR.

¹⁵ Resnik concluded her 1994 Schwartz lecture:

As this century draws to its end, we can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants. The focus is shifting from adjudication to resolution. Frank Sander's lovely image of the accessible, multi-doored courthouse—with one door wide open for adjudication—has now been eclipsed. The door to the twentieth century's version of adjudication is closing.

Resnik, *supra* note 11, at 265.

¹⁶ Although one might argue that staunch defenders of adjudication should stand resolutely against this gale in hopes of reversing public and political sentiment, the picture I see is not of a small group with conviction turning back the tide, but rather of the Dutch boy with his finger in the dike. See *supra* notes 4-5 and accompanying text; see *infra* notes 32-96 and accompanying text (describing the popularity of ADR and the low regard for lawyers, judges, and juries in traditional roles held by political elites and the public generally).

¹⁷ Weinstein, *supra* note 1, at 243 ("During the course of the last quarter century, many have posited a need to develop approaches to resolving disputes that avoid full traditional

become a part of the judicial system, perhaps inevitably²⁰ and certainly for the present. Regardless of the effectiveness of ADR in particular situations, there is no doubt that socio-political forces will continue to promote it and will not be turned back by a call for adoption of (or a return to) a greater use of traditional, full-dress adjudication of disputes.²¹

litigation.”).

¹⁸ Resnik, *supra* note 11, at 214 (“During the last few decades, ADR has become an integral part of the state’s mechanisms for responding to disputes.”).

¹⁹ Although, as discussed in *infra* notes 32–50 and accompanying text, I see the 1976 Pound Conference as an ADR watershed and inaugurating event, the arrival of ADR as a fixed part of the legal establishment can perhaps be most clearly marked as the mid-1980s, a time when the first major ADR coursebooks were issued. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985); LEONARD L. RISKIN AND JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987); SUSAN M. LEESON AND BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA (1988). Second editions have emerged. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (2d ed. 1992). Other important books frequently assigned in law school also emerged during the 1980s. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

According to Thomas Kuhn’s theory of shifts in professional ideology, one key measure of professional change is the content of textbooks. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 137–40 (2d ed. 1970). Although the emergence of ADR courses and coursebooks hardly amounts to the “rewriting” of texts that Kuhn saw as indicative of a complete scientific revolution (most law school coursebooks still deal primarily with litigation and appellate adjudicative opinions), these publications and a survey of the evolution of law school course offerings during the 1980s are indicative of the beachhead ADR has established in the legal profession.

Prior to the emergence of ADR coursebooks, the late 1970s and early 1980s saw the rise of a substantial ADR literature in legal periodicals. *See, e.g.*, Sally Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). *See also* Stempel, *New Paradigm*, *supra* note 5, at 695–737 (applying Kuhn’s theories to changes in the judicial system, including the ADR movement).

²⁰ As Resnik notes in reviewing arbitration scholarship (principally Ian MacNeil’s *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992)), American courts prior to the modern era were not consistently hostile to litigation. *See* Resnik, *supra* note 11, at 212–15.

²¹ Recent legislation has promoted ADR. For example, the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471, 473(6) (1990), deemed ADR a major principle for litigation management, and ADR was specifically encouraged in the Delay and Expense Reduction Plans which all judicial districts were required to complete.

The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat.

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However, my view of the optimal manner for judicial adoption of ADR techniques differs from Weinstein's. I interpret Weinstein as warning against the mass privatization of conflict disputing and justice via systematic ADR that occurs largely outside the court system. To combat this, Weinstein proposes a reform of substantive law and litigation procedure so that modern disputes which depart from the traditional bipolar adjudicatory model may be more effectively addressed.²² By implication, Weinstein would have the courts more stringently police and even prohibit some large categories of private ADR.²³ In addition, he hopes for government-led efforts to eliminate or resolve disputes that depart from the traditional adversary framework that governs much of litigation and ADR.²⁴ Although I tend to agree with this sentiment, it is not a realistic possibility in what might be termed the "Newt Gingrich Era."²⁵

2736 (codified in portions of 5 U.S.C. § 556 (1994); 9 U.S.C. § 10 (1994); 28 U.S.C. § 2672 (1994); 29 U.S.C. § 173 (1994); 31 U.S.C. § 3711 (1994); and 41 U.S.C. §§ 605, 607 (1994)) directs federal agencies to "adopt a policy that addresses the use of" ADR and case management (which I see as a form of ADR) for certain matters.

In the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, 5 U.S.C. §§ 581-90, agencies were authorized and implicitly encouraged to formulate regulations through negotiations with affected industries rather than through formal rulemaking, which often has adversarial qualities.

The Justice Department has directed its lawyers to consider ADR in its actions and much of the proposed "tort reform" legislation would promote or require ADR in lieu of or as a prerequisite to traditional adjudication. See Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993); Henry J. Reske, *DOJ Adopts ADR Program*, A.B.A. J., July 1995, at 38.

²² See Weinstein, *supra* note 1, at 275 ("Procedural and substantive law must be updated, more than it has been, to reflect changes in the ways in which the world does business.").

²³ See *id.* at 298 ("The power to control the law and justice cannot be permitted to seep out of the hands of the people through privatization.").

²⁴ See *id.* at 275 ("Protection of the public through administrative agencies and compensation through a health and security system offer a better alternative to the tort system.").

²⁵ The Common Sense Legal Reform Act and other portions of the Republican Contract With America (see *supra* note 4) not only urge curtailment of traditional litigation but also evidence a desire for a contraction of other government initiatives. This suggests that the U.S. House and Senate are unlikely to create, foster, or fund administrative agencies or compensation schemes that in some degree replace traditional adjudication rather than eliminating it. See generally Carl Tobias, *Common Sense And Other Legal Reforms*, 48 VAND. L. REV. 699 (1995) (analyzing and criticizing proposed GOP legal changes). However, less ideologically driven but hardly government-expanding congresses have

Streamlined "mini-adjudications" or "focus points" hold greater potential for effecting judicial improvements than the settlement brokering or broadbrush resolutions of large scale claims that seem to comprise so much of the judiciary's ADR efforts. In particular, courts should incorporate and control the application of some forms of ADR as part of the menu of judicial services provided to disputants. This is a variant of the "Multi-door Courthouse" advanced by Professor Frank Sander nearly a generation ago²⁶ and used to some degree in practice by some courts.²⁷ Unlike Resnik, I see the intelligent application of this concept as holding out the prospect of opening doors to the average litigant rather than closing them.²⁸ But like Resnik, Weinstein, and others, I emphasize that, at their core, courts must remain courts both to preserve and protect their important social role and to provide the foundation from which effective private and public ADR can proceed.²⁹

Thus, my answer to the question posed by the conference is that courts should not only adopt but co-opt a good deal of ADR into the mix of services they provide. While doing this, however, courts must be careful to protect in purified form the mother lode of their legitimacy: painstaking adjudication performed under rigorous rules of procedure, that carefully applies substantive law, and is subjected to meaningful quality control. In short, the judicial system must adapt and expand its range of services, but must retain enough of an adjudicatory core to cast the "shadow of the law"³⁰ that enables ADR and settlement to function effectively. Part of this

supported legislation that supplants traditional adjudication. See, e.g., National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10-34 (1994) (discouraging product liability claims from vaccine-related injuries and substituting administrative claims process); Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-45 (1994) (providing for federal benefits to persons totally disabled by pneumoconiosis or their eligible survivors).

²⁶ Frank E. A. Sander, *Varieties of Dispute Resolution*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D.79 (1976), at 111 [hereinafter Pound Conference].

²⁷ See *infra* notes 88-96 and accompanying text.

²⁸ Despite the dangers of creating a multi-door courthouse that does everything but adjudication, significant research suggests that the concept can and has succeeded in improving access to justice, although significant contrary research also exists. See STATE JUSTICE INSTITUTE, NATIONAL COURT-CONNECTED DISPUTE RESOLUTION RESEARCH, *supra* note 6, at 89-110.

²⁹ See Weinstein, *supra* note 1, at 295 ("The power to control the law and justice cannot be permitted to seep out of the hands of the people through privatization.").

³⁰ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (determining that divorce litigants negotiate within a framework of knowledge regarding the default rules and outcomes established by the

judicial shadow includes various levels of scrutiny applied to private ADR, including both enforcement and abrogation or modification.

This article first briefly reviews the history of ADR and outlines a number of clarifying points or caveats often overlooked in the ADR debate. It next outlines a proposed second-generation, multi-door courthouse applying a mix of publicly administered ADR methods as useful adjuncts to the core of adjudication. I consider the use of this model as applied to a variety of recurring types of cases. In advancing the notion of a second-generation, multi-door courthouse as an effective judicial absorption of ADR, I conclude that the most pronounced error of the modern dispute resolution movement in the judiciary has been its focus upon (and misdirected effort toward) advancing settlement qua settlement rather than providing what might be termed semi-adjudicatory options in addition to full-dress trial and settlement initiatives.³¹

II. ADR HISTORY AND CAVEATS FOR ANALYSIS

A. *The Development of the Modern ADR Movement*

The modern ADR movement can be said to be entering a young adulthood of sorts as it nears its 20th birthday. Many view the 1976 Pound Conference as the birth, or at least the kickoff, of the modern Court Reform/Alternative Dispute Resolution movement.³² As discussed more extensively later in this section, commentators should be careful to

legal regime).

³¹ I do not mean this criticism so literally as to suggest that courts have not made any effort to incorporate what I call "semi-adjudicatory" or "quasi-adjudicatory" ADR (I prefer the former term) into their list of options. Indeed, there are many courts that have adopted a range of these options, most prominently court-annexed arbitration. See COURT-CONNECTED DISPUTE RESOLUTION, *supra* note 6 (reviewing ADR programs in various courts).

³² By "modern" movement, I mean what I later refer to as "new ADR," discussed in *infra* notes 127-33 and accompanying text. Depending upon what one uses as a measuring stick, one can consider "old ADR" as dating back to the merchants of the Middle Ages or Renaissance. See JULIUS H. COHEN, COMMERCIAL ARBITRATION AND THE LAW 78 (1918). Alternatively, I offer other suggested points for inaugurating the modern era of ADR. Two possibilities are the enactment of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, or the founding of the American Arbitration Association, both of which occurred in 1925. For a historical sketch of the development of arbitration and judicial reaction, see Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 269-302 (1990). For reasons elaborated in *infra* notes 127-53 and accompanying text, I regard both of these important events as part of "old ADR" and view the Pound Conference as the advent of "new ADR."

distinguish between the contemporary or "new ADR" movement and traditional or "old ADR," which has existed in some form for centuries (if not millennia) and in a "semi-modern" form since the passage of the Federal Arbitration Act in 1925.³³

The Pound Conference's technical title was the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice." The invocation of the Pound imagery even included a geographic link, as the 1976 Conference was held in St. Paul, Minnesota, the site of Pound's famous speech to the ABA in 1906.³⁴ St. Paul was also home to the Conference's driving force, Warren Burger, then-Chief Justice of the United States Supreme Court.³⁵

In treating the conference as the inaugurating event of the modern era, I

³³ See IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* Chs. 1, 4, 6 (1994); IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* Chs. 4, 6 (1992); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TULANE L. REV. 1377, 1380-83 (1991) (reviewing traditional arbitration practices and the development of the Federal Arbitration Act, 9 U.S.C. §§ 1-15).

³⁴ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REPORTS 395 (1906), and 57 A.B.A. J. 348 (1971) (abridged version). The publication of the essay in abridged form more than 60 years later and its use as the imagery peg for a conference on its 70th anniversary testify, of course, to the prominence of Pound's speech, which similarly testifies to the deep-seated anxiety felt by American society (even its lawyers) toward the national system of dispute resolution. Although my relative ignorance of comparative systems may betray me, I find it hard to believe that continental Europeans, Asians, or Africans might have an insider's polemic about their system possessed of the "staying power" held by Pound's essay. The British might observe the anniversary of similar legal events (Mansfield's appointment, the publication of Blackstone's commentaries) but would likely be celebrating their system rather than decrying it. See, e.g., ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* (1990) (American lawyers make their system sound much worse than it is and the English lawyers make their system sound much worse than it is).

³⁵ Burger was appointed Chief Justice in 1969 by President Richard M. Nixon and retired in 1986. Prior to the Chief Justiceship, Burger was a judge on the United States Court of Appeals for the District of Columbia Circuit, having been appointed by President Dwight D. Eisenhower, in whose Justice Department he had served. Burger was born in St. Paul, Minnesota and practiced in the Twin Cities prior to his move to Washington and had been active in Minnesota politics as well. See THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (Leon Friedman and Fred Israel eds.) (1995); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 11-13 (1979); *Chief Justice Warren Burger Dies*, S. CT. HIST. SOC'Y Q., Vol. 16, No. 2, 1995, at 1, 19.

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borrow heavily from Stephen Subrin's analysis,³⁶ a view shared by many legal scholars.³⁷ According to Subrin, a "new ideology [of civil litigation] emerged" at the Conference.³⁸ As Subrin summarizes:

[T]here was an unmistakable tone at the Conference that the [previously prevailing] underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible. The alleged litigation explosion would have to be controlled; the few bad lawyers could not be trusted to control themselves.³⁹

The "sea change" also occurred in the courts [at approximately the same time and]⁴⁰ at the local level as well.⁴¹

³⁶ See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993).

³⁷ See, e.g., Resnik, *supra* note 11, at 216-18; Nader, *A Reply to Professor King*, *supra* note 6, at 100-01 ("ADR was publically declared in 1976 at the Roscoe Pound Conference [which was] . . . a turning point on a public debate that began, for present purposes at least, in the 1960s when opposing groups of people voiced dissatisfaction with the American legal system. One issue that was debated was access to law. The first group wished to reform the legal system by the inclusion of excluded citizens. The second group wished to find alternative solutions; solutions that were outside of the judicial system for some of those same constituents—consumers, civil rights activists, environmentalists, workers, and others. Those of us who were privileged to attend the Pound Conference can remember the press, the television crews, and the fanfare surrounding what anthropologists in other contexts would call a social drama. It was argued that the "garbage cases," as they called them, should come before alternative forums; the courts should be reserved for more important cases.").

³⁸ Subrin, *supra* note 36, at 1156. Subrin's rhetoric is perhaps strained. The new ideology that trumpeted streamlined adjudication and criticized full-scale adjudication as wasteful and insufficiently valuable had been on the scene for some time. See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1988). The Pound Conference gave this viewpoint legitimacy and exposure, however, as well as something of a rhetorical push. See Nader, *Controlling Processes*, *supra* note 6, at 101 (Pound Conference participants suggested that "garbage cases" unworthy of full-scale adjudication were clogging the courts).

³⁹ Subrin, *supra* note 36, at 1158.

⁴⁰ *Id.* at 1158 (citing the example of some 1970s precedents that "began requiring quite precise pleading [in lieu of notice pleading] for certain types of cases" most prominently and outrageously civil rights claims, a practice ruled erroneous by a unanimous Supreme Court in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993)). The Supreme Court's *Leatherman* opinion can, of course, be seen as evidence refuting the contention that courts have constricted the open access that, at least in theory, characterized the mid-1950s through mid-1970s era in civil litigation.

Viewed in historical perspective, the Pound Conference is notable for both its criticisms of the status quo in litigation and its full-court press on behalf of ADR made by an all-star cast assembled and applauded by the Chief Justice. According to Subrin, the Pound Conference was something of a watershed in that it forcefully put the legal-judicial establishment behind ADR and set the critical tone toward courts that exists to this day. The background, theme, and rhetoric of the Pound Conference made ADR fashionable and brought it to the fore of the American adjudicatory scene.⁴²

⁴¹ *Id.* at 1159 (citing a proliferation of local rules designed to limit or regulate discovery and to encourage compromise between disputants regarding both pretrial procedural positions and the underlying controversy).

⁴² As Subrin notes, the Pound Conference was not exclusively stocked with litigation-phobes or ADrophiles. Most prominently, an essay by Judge A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1976), and panel commentary by Prof. Laura Nader, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 114 (A. Leo Levin & Russell Wheeler eds. 1979), took issue with the crisis rhetoric and rush to streamlining solutions that dominated much of the Conference.

For the most part, however, the Higginbotham and Nader pieces can be seen as something of a cameo appearance by the left in what was essentially a center-right dominated event decrying both excessive rights-based social engineering through litigation and attorney obsteporousness. The leading example of the former is the oft-cited article by former D.C. Circuit judge and failed Supreme Court nominee Robert H. Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976) (accusing litigants of childishly resorting to court over trivial slights or to assert far-fetched concepts of entitlement). An example of a similar attack on supposed attorney misbehavior is by then-ABA Antitrust Section head Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976).

Of the 11 articles or essays from the Conference reprinted in *Federal Rules Decisions*, only the Higginbotham piece can be seen as defending the then-traditional adjudicatory model. An article by then-Judge and subsequent Iran-contra prosecutor Lawrence Walsh was essentially descriptive, as were contributions by then-Attorney General and former University of Chicago Law Professor Edward Levi and Judge James A. Finch. Harvard Law Professor Frank Sander's Multi-door Courthouse piece *Varieties of Dispute Processing*, 35 F.R.D. 111 (1976), which I discuss at length below, was largely moderate, despite the implicit criticism in Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*. See Resnik, *supra* note 11. The remaining six articles can accurately and fairly be described as conservative in tone, urging a deliberalization of court access and social investment in adjudication. Some of these admonitions were gentle, see, e.g., Judge Alvin B. Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law*, Pound Conference, *supra* note 26, at 176, while the Bork piece leaked venom. What is important to me, however, in confirming Subrin's

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Depending upon one's opinion of contemporary ADR and judicial politics, Chief Justice Burger deserves a good deal of the credit or blame. During the early 1970s, he lent his bully pulpit to the cause of lawyer-bashing by leveling strong criticism at lawyers. In particular, he singled out the lack of trial litigation skills as a major failing of the profession.⁴³ Undoubtedly, Chief Justice Burger's rhetoric, which received great exposure and came clothed in the prestige of his office, brought down the image of the profession and can be seen as a major beachhead for the anti-lawyer sentiment of the 1980s and 1990s. By taking lawyers down a peg, Chief Justice Burger also made the body politic more receptive to proposals for changing courts or reducing their power, a result that perhaps not coincidentally paralleled his agenda for reducing judicial interference with the police and constricting the reach of the individual liberties portions of the U.S. Constitution.⁴⁴

But, it would be incorrect to view Chief Justice Burger's efforts as a broad-based assault on courts. To a large degree, his rhetoric called to mind and advocated a return to an earlier period when lawyers were civil gentlemen trained at the feet of worthy mentors who went to court with a minimum of pretrial fanfare to obtain decisions that resolved disputes (including criminal matters) and allowed the local community to move on.⁴⁵

assessment is that the collective gestalt of the Pound Conference was to place some of the legal profession's most prominent members on the side of reform designed to undo a good deal of the adjudicatory status quo. Even former federal judge, noted liberal establishment lawyer, and William O. Douglas comrade Simon Rifkind, of New York's politically correct Paul, Weiss, Rifkind, Wharton & Garrison, weighed in on behalf of the Conference theme, *Are We Asking Too Much of Our Courts?*, Pound Conference, *supra* note 26, at 96. The total effect of the Pound Conference appears to concur with Subrin's assessment: the old era of adjudicatory freedom was decried and the new era of ADR fashionability was announced.

⁴³ See, e.g., Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training And Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973).

⁴⁴ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (Chief Justice Burger voting with the majority for the exception to an exclusionary rule barring illegally seized evidence where a police officer acted in good faith); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Chief Justice Burger dissenting from majority opinion finding a private right of action for Fourth Amendment search and seizure violations).

⁴⁵ See, e.g., Warren E. Burger, *Reflections on the Adversary System*, 27 VAL. U. L. REV. 309, 310-11 (1993) (suggesting that lawyers and parties are too contentious, often expending twice as much in disputing costs as the value of a claim in a dispute); Warren E. Burger, Address to the American Law Institute (May 15, 1984) (quoting *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F.Supp. 13, 27 (N.D. Ill. 1984) ("When the elder statesmen among you here came to the bar, I am sure you were told, as I was, that your signature on a pleading

This nostalgic attitude toward law and lawyering also parallels his voting record as Chief Justice, which generally restricted the scope of adjudicatory options for litigants in favor of a more traditional model of bipolar, event-centered private litigation.⁴⁶

Chief Justice Burger's attack on the dearth of lawyering skills was a major catalyst in the move toward clinical legal education during the 1970s and the move toward adding lawyering skills training to the internal law school curriculum during the 1980s.⁴⁷ Ironically, the academics most active in these pedagogical movements are Chief Justice Burger's political opposites, as liberal as he is conservative.⁴⁸ This seeming contradiction

or motion was something like your signature on a check.")).

⁴⁶ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (Chief Justice Burger voting with the majority to preclude a broad-based application of a state's law to a mineral rights dispute involving citizens of several states); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969) (Chief Justice Burger voting with the majority against the aggregation of claims to satisfy the jurisdictional amount requirement in class action litigation). In resisting the broad application of one legal standard to multistate disputes because of administrative convenience, Chief Justice Burger has substantial company. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.) (rejecting adoption of "esperanto" law to a class action involving citizens of 50 states). But see Weinstein, *supra* note 1, at 268-69 (citing *Rhone-Poulenc* and taking a different view that implicitly accepts some "fudging of the state law-Erie problem" in order to reach a "satisfactory resolution").

⁴⁷ See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 135-40 (Robert MacCrate ed. 1992) (major ABA-commissioned study popularly known as "MacCrate Report" identifies ADR as a fundamental skill that should be taught in law schools); Subrin, *supra* note 36, at 1165-66 ("Since I became a law professor in 1970, many, if not most, law schools have added courses in ADR, complex litigation, and international procedure as integral parts of the overall law school civil procedure curriculum."); but see generally Menkel-Meadow, *supra* note 13 (criticizing the MacCrate report as placing excessive emphasis on legal education).

⁴⁸ For example, the recently instituted *Clinical Law Review* was initiated to a significant degree by the efforts of the New York University clinical and skills faculty, whose most prominent member and designer of the NYU Lawyering Skills program is Anthony Amsterdam, a noted death penalty opponent and defender of criminal defendants' rights. See ANTHONY AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF A CRIMINAL CASE (4th ed. 1984). The first issues of this publication contained a high percentage of articles by law faculty generally regarded as left-liberal politically, even when counting the ideologically diverse set of speakers in the *Clinical Law Review's* symposium on the MacCrate Report. *Id.* at 348-458. Although one can dispute the degree to which clinicians and skills faculty are "liberals" rather than "conservatives," even a casual legal reader would quickly observe a difference between the *Clinical Law Review* and, for example, the *Journal of Legal Studies* or

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probably stems from the other catalysts of the clinical/skills movement: the defendants' rights movement, the antipoverty movement, and the desire to expand legal services to the middle class, all of which were largely championed by political liberals.⁴⁹ The clinical/skills movement has also been supported by educational theorists of both the left and right who regard legal education as enhanced by the practice of linking legal theory to the application to lawyering tasks.⁵⁰ Ironically, Chief Justice Burger's blast at lawyers helped to enhance a segment of legal education that would not only train lawyers better but unleash them in the service of those whose politics differed rather dramatically from his own.⁵¹

By the mid-1970s, Chief Justice Burger had moved from criticizing lawyers and urging their improvement within the legal system to endorsing efforts to evade the legal system. Specifically, he suggested the substitution of arbitration for litigation as a "better way" of resolving disputes.⁵² In the effort to promote arbitration and other forms of ADR, Chief Justice Burger harnessed the prestige of his office to produce the Pound Conference and other efforts. As noted above, the Pound Conference made heavy use of the Pound imagery, invoking the name of this giant of American jurisprudence;

the *Harvard Journal of Law and Public Policy*, whose pages generally reflect the views of more conservative authors.

⁴⁹ Many clinical teachers, particularly in criminal defense representation programs, previously worked as public defenders or legal aid lawyers, organizations whose attorneys are normally drawn to the work in part because of liberal political views regarding individual rights and government policy.

⁵⁰ Although many feel that the legal academy continues to pay insufficient attention to the real world problems of lawyering. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); but see Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647 (1993) (arguing that Edwards underestimates the practical value of much theoretical and interdisciplinary legal scholarship and that the rise of clinical and skills education during past the 20 years refutes Edwards' criticism).

⁵¹ Clinical and skills courses frequently train lawyers who subsequently provide aggressive representation of criminal defendants and poor or disfavored groups asserting constitutional rights—entities never high on Chief Justice Burger's list of favored litigants. Occasionally, in a manner similar to criticisms of legal aid, law school clinical programs themselves come under attack from conservatives or the business community as fomenting undesirable litigation seeking advantage for workers, the poor, women, or racial minorities.

⁵² See Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274 (1982). The Chief Justice continued expressing this theme in his writings. See, e.g., Burger, *Reflections on the Adversary System*, *supra* note 45, at 310-11 (expressing pride in the accomplishments of the Pound Conference but stating "litigation in our courts remains a timely and costly endeavor for everyone involved. . . . Are we litigating when we should be arbitrating?").

staging the conference almost on the spot where Pound once (I cannot resist this pun) expounded on the deficiencies of American justice; and publishing the proceedings in West's *Federal Rules Decisions* reporter, which guaranteed wide exposure of the Conference's pro-ADR sentiments, especially to the nation's federal judges.⁵³

It was not so much the content of the Pound Conference as its tone that marked it as a movement away from the "merits-oriented" ethos of the 1938 Federal Rules and toward a dejudicialization of dispute resolution.⁵⁴ The Conference even included some progressive sentiments in favor of merits-based adjudication and solicitude for the litigants.⁵⁵ But the thrust of the Pound Conference, even from speakers generally regarded as liberals, was that courts were becoming clogged due to an avalanche of more traditional cases and the efforts of some litigants to thrust courts into new and probably inappropriate roles. The Pound Conference podium's most conservative speaker, Judge Robert H. Bork, leveled a polemic attack on modern adjudication, particularly the individual rights movement and impact litigation of the 1950-1975 period.⁵⁶ The program also included a presentation by Judge Alvin B. Rubin,⁵⁷ who not coincidentally would later be identified as a major proponent of "managerial judging,"⁵⁸ an example of the changing nature of adjudication and a type of ADR itself subject to considerable debate.⁵⁹

⁵³ In appraising the Pound Conference from some temporal distance, Chief Justice Burger understandably crowed, but did not focus on ADR:

As a result of the ideas that flowed from the Pound Conference in 1976 and the dedication of so many judges and lawyers in implementing them, much of the deferred maintenance of the American systems of justice that was desperately needed has been accomplished. To name a few examples, the Court of International Trade was created, as was the Eleventh Circuit Court of Appeals. Congress passed the Omnibus Judgeship Act in 1978 and also enacted the Dispute Resolution Act. Modern computer systems are commonplace in our courts, and we have seen improved juror protection and compensation in the federal and state systems alike.

Burger, *Reflections on the Adversary System*, *supra* note 45, at 310.

⁵⁴ See Subrin, *supra* note 36, at 1158 ("[T]here was an unmistakable tone at the Conference that the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible.").

⁵⁵ See Higginbotham, *supra* note 42.

⁵⁶ Robert H. Bork, *supra* note 42, at 233 (courts are too often used in "self-defeating effort to guarantee every minor right people think they ought ideally to possess.").

⁵⁷ Rubin, *supra* note 42.

⁵⁸ See, e.g., Hubert Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1978).

⁵⁹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing

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In the wake of the Pound Conference, ADR continued to advance: (1) as part of the legal profession's lexicon; (2) as a source of continued experimentation—both by private entities and the courts; (3) as a growing industry; (4) as a source of authority for altering litigation procedure, sometimes streamlining it (managerial judging)⁶⁰ and sometimes enlarging it (through the proliferation of local rules and detailed standing orders that create a de facto second set of local rules);⁶¹ (5) as a wellspring for legal doctrine more solicitous of the application of ADR;⁶² and (6) as a reference point for criticizing courts, lawyers, and adversarialism.⁶³ By the late

aggressive judicial management and efforts to prompt settlement). Resnik's assessment touched off a debate that continues. See generally E. Donald Elliott, *Managerial Judging and the Evolution of Procedures*, 53 U. CHI. L. REV. 305 (1986).

⁶⁰ One might alternatively view managerial judging as destroying it, depending upon one's position. See *supra* notes 58–59.

⁶¹ See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020–2023 (1989) (1988 U.S. Judicial Conference Study finds more than 5000 local rules, with over 400 relating to discovery).

⁶² See, e.g., *Mastrobuono v. Shearson/Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995) (upholding arbitrators' award of punitive damages despite choice of law clause selecting state law that forbid arbitrator to make punitive damage award); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring arbitration of age discrimination claim subject to industry-wide required arbitration clause); *De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953), and finding claims under Securities Act of 1933 subject to arbitration); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (requiring arbitration of claims under Securities Exchange Act of 1934); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (requiring arbitration of antitrust claims thought by many to be exempt from arbitration); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (Arbitration Act requires court to enforce arbitration clause in contract).

Although there have been notable Supreme Court decisions refusing to enforce arbitration agreements, these have largely been based on the limited scope of the arbitration agreement. See, e.g., *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1987). Despite having significant quarrels with the Supreme Court's clumsy approach to issues of contractual consent in the ADR context (see Stempel, *supra* note 33) and statutory interpretation regarding the employment exception to the Federal Act, (Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259), I generally applaud the removal of public policy-based objections to ADR, particularly ADR chosen at the disputants' volition, even through pre-dispute agreements. See Stempel, *supra* note 32.

⁶³ However, it may be the other way around. See Resnik, *supra* note 11, at 255–60

1970s, the words "alternative dispute resolution" tripped readily off the tongue of any lawyer conversant with contemporary legal thinking. In 1977, Congress, at the urging of the Justice Department, began the "experiment" with court-annexed arbitration that is now nearing its 20th year.⁶⁴ By the turn of the decade, managerial judging was sufficiently widespread to provide an inviting target for Professor Resnik's feature-length attack upon it, which in turn spurred retaliation and counter-debate.⁶⁵ During the 1980s, arbitration and mediation services grew apace, with entire industries such as securities brokerages successfully privatizing much of the dispute resolution for investor and employee disputes.⁶⁶ To be sure, there was debate and counterattack nearly every step of the way.⁶⁷ For the most part, however,

(noting that ascendancy of ADR movement was coupled with derogation of litigation and discussing the degree to which embrace of ADR was the cause or effect).

⁶⁴ See 28 U.S.C. §§ 651-68 (1994); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 1 (1990) (the ten original federal district courts to adopt court-annexed arbitration are: Eastern Pennsylvania, Middle Florida, Western Missouri, Western Oklahoma, Middle North Carolina, Northern California, Western Michigan, New Jersey, Eastern New York and Western Texas; many state courts have similar programs, some of which predate the federal models; the Pittsburgh area state courts are generally credited with initiating court-annexed arbitration in 1952).

⁶⁵ See *supra* notes 37-40 and accompanying text.

⁶⁶ See Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095 (1993); New York Stock Exchange, Inc., *Symposium on Arbitration in The Securities Industry: A Report* (May 30, 1995).

⁶⁷ For example, the arbitration of employment disputes, both in the securities industry and other fields, has prompted controversy and efforts to limit the reach of mass-produced arbitration agreements. See, e.g., David E. Rovella, *EEOC Says No to Forced Arbitration*, NAT'L. L.J., June 5, 1995 at B1; but see *Agency Watch, Justice Hires; the EEOC Embraces ADR*, NAT'L. L.J., April 11, 1994, at B2 (I am honestly not attempting to imitate the *New Republic's* editorial section featuring inconsistent headlines, often from the same newspaper); Margaret Jacobs, *Questions Arise over Arbitrators' Powers*, WALL ST. J., Feb. 10, 1995, at B6, G11; Margaret A. Jacobs & Michael Siconolfi, *Losing Battles, Investors Fare Poorly Fighting Wall Street*, WALL ST. J., Feb. 8, 1995, at A1. The EEOC's newfound misgivings about mass mandatory arbitration resulted in its filing suit to obtain injunctive relief against the practice. See *EEOC v. River Oaks Imaging and Diagnostic*, No. H.-95-775, 1995 U.S. Dist. LEXIS 6140 (S.D. Tex. April 19, 1995).

Even lawyers are not immune. Law firms are beginning to require new associates to sign arbitration agreements as a condition to beginning employment. See Mark Curriden, *Sign It, Alston & Bird Staff Told*, A.B.A. J., Aug. 1994, at 25. The article states:

The 270-lawyer Atlanta firm required all staff—partners, associates, paralegals and secretaries—to sign employment contracts.

The two-page contract restricts release of confidential information and mandates

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the journey has proceeded in linear fashion.⁶⁸

The development of the Federal Rules of Civil Procedure during the contemporary ADR era is harder to place, and while largely consistent with the advancement of ADR, exhibits a somewhat contradictory path that also serves to illustrate the relative speed of the change in attitudes toward adjudication. For example, not that long before the Pound Conference, the Civil Rules Advisory Committee of the Judicial Conference, as implicitly endorsed by the Conference, Supreme Court, and Congress, undertook procedural reforms that have been favorite whipping boys for those critical of courts and favoring increased use of ADR. In 1966, Rule 23 was substantially revised to facilitate increased use of class actions.⁶⁹ In 1970,

that all staff disputes be resolved through arbitration. Senior partners at the firm say the covenant reduces the possibility of the firm's "dirty laundry" being aired in the press or in the courtroom.

[However, associates] objected to what they called the "old white male provision" of the contract, which required the arbitrator to have at least 20-years' experience at a similarly sized law firm. The concern was that such a person may not be sensitive to claims of sexual harassment and race discrimination.

Id.

Other employers have gone further, imposing arbitration agreements on employees designed to be effective without signature. *See, e.g.,* Brown & Root, THE BROWN & ROOT DISPUTE RESOLUTION PROGRAM (1993) (brochure setting forth arbitration agreement providing for AAA arbitration of "problems that happen at work"). The company position regarding contract formation was that:

Effective June 15, 1993, Brown & Root will adopt this four option program [including an "open door policy," a conference, and mediation as precursors to arbitration] as the exclusive means of resolving workplace disputes for legally protected rights. That means, if you accept or continue your job at Brown & Root after that date, you will agree to resolve all legal claims against Brown & Root through this process instead of through the court system.

Id.

⁶⁸ *Id.* For example, the California courts have found legally operative a bank's arbitration clause in credit card agreements that, like the Brown & Root employment clause discussed in the preceding note, purport to make continued participation in the relationship operative consent to the arbitration agreement. *See* *Badie v. Bank of America*, No. 944916, 1994 WL 660730 (San. Fran. Sup. Ct. Aug. 18, 1994); Hal Davis, *Banks Follow Brokerages: Arbitrate Yes, Litigate No*, NAT'L L.J., Sept. 12, 1994, at B1 (discussing *Badie* case).

⁶⁹ *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 703-05 (6th ed. 1993) (1966 Amendments expanded class actions by substituting functional tests for prior conceptual categories, but "[s]ince the 1966 amendments, even the utility of class actions has been the subject of much debate").

the discovery rules were expanded, principally by removing the "good cause" requirement for document production and expanding the Rule 26 definition of discoverable matter to include anything related to the "subject matter" of the case (rather than directly tied to a "claim or defense"), including matters that were not admissible at trial so long as the information sought was "reasonably calculated to lead to the discovery of admissible evidence."⁷⁰

By the time of the Pound Conference a decade later, both of these Civil Rules reforms were under substantial attack, although their defenders appeared to be holding the metaphorical fort.⁷¹ For example, the bulk of the academic literature was highly critical of the 1970s Supreme Court decisions limiting the reach of the class action,⁷² and discovery was still presented to law students,⁷³ lawyers,⁷⁴ and the public⁷⁵ as a breakthrough enabling litigation to find truth and right wrongs. After the Pound Conference, the ascension of ADR was paralleled by decreasing confidence in adjudication, particularly following the 1966 and 1970 reforms. By the early 1980s, the words "discovery abuse" were on the lips of many lawyers and virtually all politically conservative litigation interest groups such as the defense bar, manufacturers, insurance companies, as well as political conservatives generally.⁷⁶ The movement was sufficiently strong to prompt an amendment

⁷⁰ See ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 12.2 (2d ed. 1988); FED. R. CIV. P. 26(b)(1).

⁷¹ See COUND, *supra* note 69, at 849 (upurge in discovery sanctions after *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), "which strongly supported the use of sanctions" for discovery misconduct); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (describing 1970s controversies over apt use of class action device); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

⁷² See, e.g., Miller *supra* note 71.

⁷³ See, e.g., COUND, *supra* note 69.

⁷⁴ See *supra* note 70; FED. R. CIV. P. 26(b)(1).

⁷⁵ See, e.g., JOSEPH C. GOULDEN, THE SUPER-LAWYERS: THE SMALL AND POWERFUL WORLD AT THE GREAT WASHINGTON LAW FIRM (1972) (citing examples of lawyers using the discovery process to break open cases).

⁷⁶ See ROBERT E. RODES ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 85 (1981) ([C]ourts are reluctant to impose sanctions, this results in "considerable laxity in the day-to-day application of the rules. Attorneys are well aware that sanctions will be imposed only in the most flagrant situations."); C. RONALD ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE (1979); Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983); Mary M. Schroeder & John P.

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of the Federal Rules to require some restraint in discovery, a move Justice Powell criticized as toothless in dissenting from the promulgation of the Rule change.⁷⁷

In 1983, Rule 11 was amended to give it teeth, forbidding the written submission of any statement not "well grounded in fact," "warranted by law," or justified by an argument for law reform.⁷⁸ The bar and bench responded to Rule 11 like children with a new toy: they used it until it broke. Rule 11 was quickly and frequently applied to a wide range of disputes, sometimes harshly, unfairly, and erroneously. Rule 11 proved a popular judicial tool for punishing complaints viewed as unmeritorious and was also directed aggressively at perceived discovery abuse, a surprising outcome in view of the timidity with which the bench had applied (or failed to apply) Rule 37's provision for fee-shifting against those who took unjustified positions regarding discovery disputes.⁷⁹ The Supreme Court granted certiorari on a number of Rule 11 cases and managed to, if anything, make the situation worse.⁸⁰ Late 1980s grumbling led to studied

Frank, *Discovery Reform: Long Road to Nowheresville*, 68 A.B.A. J. 572 (1982); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264 (1979). It is perhaps not coincidental that two of the authors critical of discovery excess (Renfrew and Sofaer) were federal district judges while a third author (Ripple) subsequently was appointed to the Seventh Circuit.

⁷⁷ Letter of Transmittal, 446 U.S. 996, 999 (1980) (Powell, J., dissenting).

⁷⁸ See GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES*, Ch. 2 (1990); Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It With Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257 (1991); Georgene M. Vairo, *Rule 11: Where We Are And Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).

⁷⁹ See Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986). My characterization of the federal judiciary's application of Rule 11 (which perhaps extends beyond the scope of the criticisms cited) may be a bit unfair. Many commentators observed a substantial improvement in Rule 11 jurisprudence by the late 1980s. See, e.g., Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991). During this five-year "shakedown cruise," however, many lawyers and litigants suffered unnecessarily for only speculative gain to the judicial system.

⁸⁰ See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (upholding imposition of sanction even though the court was later found to lack subject matter jurisdiction); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) (deciding the case on a fact-specific basis and making broad statements about Rule 11 that could be

reform efforts by the Advisory Committee and other elements of the rulemaking establishment, culminating in the 1993 Amendment to Rule 11, which clarified the standard, made sanctions discretionary, and provided a "safe harbor" from monetary sanctions for lawyers who withdrew an offending assertion when served with a Rule 11 motion.⁸¹

Rule 11 provides an interesting illustration of the frequently schizophrenic behavior of bench and bar. In one breath, aggressive action is taken against a perceived problem, often without significant empirical analysis of the problem or anything resembling a canvass of the elements of the legal profession and society that are not wired into the rulemaking establishment. In the virtual next breath, problems are recognized and the earlier changes are rolled back, such as when Rule 11 was amended. Sometimes contradictory action is taken, often without any seeming realization that it is contradictory. In my view, for reasons discussed at length later in this article, the 1993 amendments to Rule 26 establishing a system of disclosure and presumptive limits on interrogatories and depositions⁸² (which probably exacerbates the problems of delay, cost, and dispute resolution)⁸³ are a similar example in that they not only offend adjudicatory purists but also fail to meet the streamlining goals of the ADR movement.

But whether one likes or loathes disclosure, there is no doubt that its arrival provides further evidence of the rise, plateau, and decline of enthusiasm for full-scale litigation, all within a mere 30 years, with the

interpreted as advocating either aggressive or cautious application of sanctions); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (providing that trial court imposition of sanctions will be reviewed according to a relatively lax "abuse of discretion" standard even as to factual disputes and that sanctions could be imposed on the basis of a claim voluntarily withdrawn) (the latter situation is now effectively precluded by the 1993 Amendments to Rule 11); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (providing that only the signing party is subject to Rule 11, effectively allowing law firm partners to force associates to assume sanctions risk in submitting papers to court) (a decision later "overruled" by the 1993 Amendment to Rule 11, which provides for vicarious liability in such situations).

⁸¹ See generally Vairo, *supra* note 78, Ch. 1; George Cochran, *Rule 11: The Road to Amendment*, 61 U. MISS. L.J. 5 (1991).

⁸² See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 72-78 (1993) (promulgating amended Rule 26(a) and amended Rule 11).

⁸³ See Stempel, *supra* note 4, at 342-54; Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is it Again Time for Reform?*, 138 F.R.D. 155 (1991); but see Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992) (arguing that disclosure will improve the efficiency of litigation).

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Pound Conference in retrospect appearing as a significant turning point. From enthusiastic expansion of discovery in the 1970s, we have moved to constriction of it and heightened scripting of the fact development process by rules, local rules, and standing orders as well as an implicit attitude that facts are simply "there" waiting to receive the application of predictable rules of law and that adversarial fact gathering (e.g., through depositions of adverse witnesses) carries more costs than benefits. Although the picture is mixed, the overall development of the Federal Rules during the modern era of ADR is largely consistent with the ADR movement, and represents the profession's bending to ADR-style thinking rather than a resistance to ADR and a defense of the adjudicatory model.

Of course, one can criticize aspects of a social movement, particularly its tone and process, but still find much of value in the movement. The history of the Pound Conference and the ADR movement may offend one's sensibilities to the extent it can be seen as a history of political conservatives and business or other monied interests attempting to solidify power or to turn back the gains made by individuals, consumers, racial minorities, women, or progressives.⁸⁴ It is no accident that the corporate community has embraced ADR not only as a means of controlling costs in disputes between commercial entities but also as a means of preventing individuals from placing claims before a jury.⁸⁵ In addition, the tone of ADR advocates or fellow traveler reformers often has an air of condescension. Most illustrative of this trait is Justice Scalia's call for reduced federal court jurisdiction, implying that the matters he would remove from the consideration of federal court are simply not very important.⁸⁶ In similar fashion, ADR advocates often make the de facto

⁸⁴ See Nader, *Controlling Processes*, *supra* note 6, at 23-24.

⁸⁵ See, e.g., Subrin, *supra* note 36, at 1167 n.56 (describing exchange with Aetna Insurance Vice President Judith W. Pendell concerning portion of litigation claims that are frivolous). Aetna has been active in promoting ADR on a number of fronts and, among other things, provided funding for the Brookings Institution Report, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989), which served as a major underpinning of the Civil Justice Reform Act of 1990. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 800-05 (1993); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 131 (1991) (also noting the degree to which corporate America generally has championed court reform and ADR and the prospect that CJRA chief sponsor Sen. Joseph Biden (D-Del.) may have been influenced by the high concentration of corporations chartered in his home state).

⁸⁶ See Address by Justice Antonin Scalia to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), *reprinted in* 34 Fed. B. News & J. 252 (1987). See also Resnik, *supra* note 11, at 258-59; Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990)

suggestion that claims involving lower stakes can safely be relegated to modes of processing that are more streamlined than the courts although not perhaps as sagacious.⁸⁷

B. Sander's Multi-door Courthouse as the Unifying ADR Initiative

As my version of ADR history perhaps reveals, I have many misgivings about many ADR efforts, but I also find many aspects of ADR attractive (assuming, of course, that they are intelligently and fairly administered; both slipshod ADR and incompetent adjudication are dreadful).⁸⁸ Consequently, despite some troubling aspects of its lineage, Prof. Sander's multi-door courthouse proposal continues to hold considerable attraction. Among the many aspects of the Pound Conference worth remembering, it stands out as a particularly instructive potential blueprint for the future—an argument developed at greater length in Part II. For the moment, it is sufficient to review Sander's contribution to the Pound Conference and the multi-door courthouse as envisioned by Sander in 1976. Sander's contribution to the Pound Conference⁸⁹ remains the most useful, a view widely shared in the legal profession and evidenced by his article's status as the most-cited component of the Pound Conference.⁹⁰ Sander's comprehensive attack on the problem also provides a yardstick for evaluating intervening developments.

Sander began by accepting the basic Burger premise of the Conference—that court caseloads were growing too fast to maintain the current system. He then outlined a number of means of preventing this

(noting that prominent figures such as Richard A. Posner, Robert H. Bork, and others (including, occasionally, people who never were on the University of Chicago Law School faculty) have made similar arguments).

⁸⁷ Stempel, *supra* note 5, at 717-27; Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986). Both can be read as implicitly taking this view, but I read Alschuler more benignly. See *infra* notes 274-75 and accompanying text.

⁸⁸ Incompetent adjudication may be even more dangerous than slipshod ADR in that adjudication usually has more formality, finality, and precedential impact than ADR.

⁸⁹ Sander, *supra* note 26.

⁹⁰ Sander's Multi-door Courthouse article has been cited repeatedly and quoted at length in textbooks and has frequently been a focal point of scholarly commentary. See, e.g., Resnik, *supra* note 11, at 216-18. Although LEXIS searches depend on the vagaries of author citation and the specific database, it appears that Sander's article is by far the most cited Pound Conference Article (69 full blue book citations in the law review database), outdistancing even the well-known Burger (49) and Bork pieces (35) by wide margins.

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possible imbroglio, such as:

a) preventing disputes through clarified legal rules, including replacing judicial discretion with fixed formulae or "greater emphasis on preventive law," a development he thought would be hastened by the growing use of prepaid legal services.⁹¹

b) Sander also suggested exploring "alternative ways of resolving disputes outside the courts." In particular, Sander criticized lawyers for tending "to assume that the courts are the natural and obvious dispute resolvers, when, [i]n point of fact there is a rich variety of different processes . . . [that] may provide far more 'effective' conflict resolution."⁹²

Sander also proposed "the following criteria for determining the effectiveness of a dispute resolution mechanism: cost, speed, accuracy, credibility (to the public and the parties), and workability," adding that "[i]n some cases, but not in all, predictability may also be important."⁹³

Sander then outlined the variety of disputing methods he regarded as apt:

- a) adjudication;
- b) arbitration, either court annexed or private (which still is subject to some judicial supervision pursuant to the Federal Arbitration Act);
- c) an administrative procedure (either subject to judicial review or administered by the court);
- d) problem-solving efforts by a government ombudsman or a similar fact-finding inquiry;
- e) mediation or conciliation by the parties;
- f) negotiation; or
- g) avoidance of the dispute.⁹⁴

Since Sander wrote, hybrid forms of this basic dispute resolution menu have developed, including med-arb (an attempt at mediation followed by arbitration if the mediation should not succeed in resolving the dispute), the summary jury trial, and early neutral evaluation.⁹⁵ In addition, different

⁹¹ Sander, *supra* note 26, at 112.

⁹² *Id.* at 112-13.

⁹³ *Id.* at 113 n.7.

⁹⁴ *Id.* at 114.

⁹⁵ The summary jury trial involves an abbreviated presentation by the parties (usually consisting of a witness or two, key documents, and attorney narrative and argument) to a

forms of arbitration seem more common, including high-low arbitration, final offer arbitration, and what might be termed "lit-arb," arbitration that provides more document exchange and other information gathering from adverse parties than does traditional arbitration.⁹⁶

Sander listed his ADR devices in descending order of judicial involvement but did not state in detail the degree to which the court system might be involved in actively operating ADR methods such as arbitration or mediation rather than policing it.

Adding yet another list of considerations, Sander also advanced criteria for determining "how particular types of disputes might best be resolved":

1. *The Nature of the Dispute*

Sander argued that unusual or unprecedented events were better served by litigation. He also saw controversies inapt for all-or-nothing solutions as well suited for ADR, which could craft more flexible solutions. High volume, routine, replicable matters were apt for litigation but demanded a

mock jury chosen from the actual jury venire. After hearing the presentations, the jurors return a nonbinding verdict which provides the parties and counsel with additional information which can be used to facilitate settlement. See Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980) (proposing and outlining technique). Judge Lambros is said to have "invented" the device. But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (criticizing summary jury trial).

Early Neutral Evaluation ("ENE") is a process in which the parties and counsel are compelled to present the gist of their claims to an impartial third party shortly after the case has commenced. The neutral party reviews the controversy and renders a nonbinding opinion as to the value of the claims and likely result if the matter were fully litigated. See JOSHUA ROSENBERG ET AL., REPORT ON THE EARLY NEUTRAL EVALUATION PROGRAM FOR THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (1992); see also Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343 (1992) (reviewing ENE and other court-connected ADR mechanisms).

⁹⁶ See generally GOLDBERG ET AL., *supra* note 19 (2d ed. 1992); COUND, *supra* note 69, at 1311-18 (listing the following as primary ADR programs: small-claims court, arbitration, final-offer arbitration, one-way arbitration, court-annexed arbitration, private judging, negotiated settlement, mediation, court-annexed mediation, a neighborhood justice center, an ombudsperson, the mini-trial, and the summary jury trial in addition to containing an early excerpt from Sander's multi-door courthouse article); AMERICAN BAR ASS'N., JUST SOLUTIONS: A PROGRAM GUIDE TO INNOVATIVE JUSTICE SYSTEM IMPROVEMENTS 8-15 (1994) (listing the following programs: early neutral evaluation, criminal mediation, small claims mediation, neutral case evaluation, public dispute mediation, night prosecutor mediation, "settlement now" initiative, and the District of Columbia Multi-door Courthouse).

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more streamlined form of litigation such as processing by an administrative agency. Determining principles for application (the law making and public policy making of courts) was most apt for adjudication and should remain a court function. However, application of settled principles to complex fact disputes, according to Sander, might be better handled by a more streamlined proceeding.⁹⁷

With the benefit of 20-20 hindsight, some of Sander's illustrations here and elsewhere in the article appear almost quaint (*e.g.*, his sanguine outlook on the efficacy of prepaid legal service plans).⁹⁸ For example, his illustration of a dispute that could be factually determined without full-scale adjudication was divorce, where he thought that questions of living apart were of a nature "that a clerk can determine," while issues of irreconcilable breakdown in the marriage "could readily be relegated to a ministerial official."⁹⁹ Although Sander was careful to confine his suggestions for streamlining to the decision to authorize a divorce rather than decisions regarding child custody and support, alimony, or property division, subsequent work concerning the complexities of these areas and the potential for diserving weaker disputants, usually wives and children, in the divorce process suggest that Sander probably spoke too soon.¹⁰⁰

2. *The Relationship Between the Disputants*

Sander observed that adversarial disputing culminating in a dramatic and final adjudication might be a fine crescendo for unaffiliated combatants but also noted that entities with long-term relationships would probably benefit from a less combative case processing system such as mediation.¹⁰¹ Although this point is now so commonplace that it is regarded as a near-

⁹⁷ Sander, *supra* note 26, at 118-20.

⁹⁸ Sander is, of course, not the only commentator who in retrospect seems to have been overly seduced by the siren vision of prepaid legal services expanding citizen access to legal assistance. See, *e.g.*, Russell G. Pearce, Patrick W. Shea & Jeffrey W. Stempel Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 155 (1980) (concluding, based in part on empirical analysis of ABA-ABF SURVEY ON THE LEGAL NEEDS OF THE PUBLIC (Barbara Curran, Rptr., 1976), that closed-panel prepaid legal services plans and storefront legal clinics held substantial potential to increase public access to legal services). Although these and other nontraditional methods of delivery have had some success, prepaid plans, despite favored tax treatment as an employee fringe benefit, have simply not enjoyed widespread use.

⁹⁹ Sander, *supra* note 26, at 119.

¹⁰⁰ See *infra* notes 254-60 and accompanying text (discussing appropriateness of mediation for domestic disputes and controversy surrounding its use).

¹⁰¹ Sander, *supra* note 26, at 120-24.

axiom in a field of law where axioms are few, it was an important and perhaps novel insight in 1976.¹⁰² Sander's examples of relationship disputes that might better be resolved outside of courts were those involving neighbors, family members, and inmates.

3. *The Amount in Dispute*

Sander regarded this factor as relatively unimportant standing alone, noting that "a small case may be complex, just as a large case may be simple." Sander suggested that a lay individual or paraprofessional might first deal with small disputes at a "preliminary investigative-conciliational stage" so long as there was "ultimate recourse to the court," thus "preserv[ing] the adjudicatory process for those cases where the issues have been properly joined and there is a genuine dispute of fact or law."¹⁰³ Although there is significant merit in this idea (which I expropriate in Part II for advancing my vision of the future multi-door courthouse—Sander's breezy suggestion, delivered in a paragraph, oversimplifies both the task and the risks, an oddity in light of Sander's recognition only a few lines earlier that "the evidence now seems overwhelming that the Small Claims Court has failed its original purpose; that the individuals for whom it was

¹⁰² Indeed, the bulk of Sander's list appears to have stood the test of time quite well to date. For example, see Pamela Chapman Enslin, *The Art of Negotiating: When to Use Alternative Dispute Resolution*, A.B.A. J., June 1995, at 90-91, which listed the following as circumstances which should prompt counsel to consider ADR:

- 1) The parties have a continuing relationship they want to preserve (suggesting mediation);
- 2) Only one issue in a lawsuit is blocking a settlement (suggesting summary jury trial);
- 3) The only issue in a simple contract dispute is whether the contract was breached, and if so, what damages are (suggesting arbitration);
- 4) The cost of going to court would exceed the amount in controversy (suggesting a compromise settlement);
- 5) The dispute will inevitably arise during the ongoing performance of a contract (suggesting the need for an arbitration clause that will encompass future disputes);
- 6) Technical matters involving a great deal of money are at issue (suggesting expert arbitration or mini-trial);
- 7) Employment situations (suggesting mediation/arbitration to minimize tension and avoid publicity).

Although Enslin's list can be misread or seen as too "pat," her generalizations are largely accurate and can form a basic guideline for intake and screening practices proposed in the modified multi-door courthouse of Part II, *infra*.

¹⁰³ Sander, *supra* note 26, at 124-25.

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designed have turned out to be its victims.”¹⁰⁴

4. Cost

Like others at the Pound Conference, Sander wanted disputing to cost less. In determining the appropriate level of investment, he suggested courts be guided by a cost-benefit analysis that balanced the importance of the matter, its complexity, and value to the parties. Most particularly, he criticized the broad-based subsidization of adjudication and suggested that court users pay something closer to the actual cost of their use of the judicial system through the imposition of higher filing fees or a similar tax. Sander compared subsidized adjudication to arbitration's typical imposition of filing fees based on stakes of the controversy. Based on anecdotal evidence, Sander concluded that many lawyers and clients were erroneously deterred from arbitrating due to the cost of filing fees.¹⁰⁵

Oddly, Sander failed to consider the implications of this observation, if it is at all true; but Sander was probably talking to some atypical attorneys. If arbitration has the cost and speed advantage posited by its backers, it presumably would be preferred to litigation even if larger user fees were assessed by the tribunal. Unless the user fees are exorbitant or the dispute unusual, counsel fees and similar costs of pressing the case generally dwarf user fees. Where the user fee is based on the amount at issue, rational combatants will invest more in disputing costs, ensuring that these costs continue to outpace user fees. If the arbitration process is significantly faster and cheaper to undertake than litigation, the comparative savings in disputing costs should far exceed the higher, unsubsidized, user fees charged by private arbitration organizations.¹⁰⁶

If Sander's lawyer sources are acting shrewdly by avoiding arbitration because AAA fees are higher than court filing fees, this constitutes a powerful indictment of the notion that arbitration, being less procedurally involved than litigation, is cheaper to use. Not surprisingly, subsequent studies of arbitration in practice, even those generally favorable to arbitration, have found that it is not appreciably faster or cheaper than litigation of similar matters. Court-annexed arbitration may even prompt an increase in costs to the extent it becomes an additional layer of procedure

¹⁰⁴ *Id.* at 124.

¹⁰⁵ *Id.* at 125-26.

¹⁰⁶ See generally Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper*, 3 J.L. ECON. & ORG. 143 (1987) (discussing escalation effect and its negative implications for prospects of success for English “loser pays” rule, and concluding that it will increase litigation costs).

simply engrafted onto the existing adjudication system.¹⁰⁷

At the very least, Sander's lawyer sources at least are suggesting that any "efficiency gap" between litigation and arbitration is much narrower than commonly thought. However, both seemingly inconsistent observations can be true. Arbitration may not be all that much more efficient than litigation but the subsidization of judicial user fees may be both a bad thing—in that it encourages free riding and other problems—and a taxpayer-funded means of preventing the behavior of disputants from accurately illustrating their relative preferences for litigation as compared to arbitration or other ADR forums that charge more for their services.

5. Speed

All other things being equal, Sander, like most of us, prefers resolving disputes faster. However, as he acknowledges, perhaps insufficiently, a dispute resolution process that rushes to judgment is not an improvement over litigation where it results in inaccuracy, unfairness, or frayed relations between the disputants or between the disputants and the tribunal.¹⁰⁸ Subsequent developments have suggested that the danger of excessively accelerated decision-making may be greater than traditionally supposed. The late 1970s ushered in a new class of long-latency tort claims such as those involving asbestos, hazardous waste, and biomedical products, such as the Dalkon Shield. In all of these instances, time has been an ally in ascertaining more information about the actual operation of these products or the conduct of the defendant manufacturers. Today, much continues to remain uncertain about the nature of pollution claims and the actual impact of breast implants on users. Despite this incomplete knowledge, these claims are being resolved by settlement, ADR, and even full-scale trial without awaiting enhanced information about the underlying claim.

This may be inevitable in a world where claimants, counsel, defendants, and insurers wish to close unpleasant matters and move on, but it illustrates that speed may not always be a virtue in dispute resolution. If combatants lack the resources or patience to await more accurate fact finding, they always retain the option of settling informally at an early stage. A disputing process that moves too quickly does not enhance this prerogative, but may reduce the quality of resolution that results, making for a net loss of social welfare. However, the flip side of this conundrum is

¹⁰⁷ See generally Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); John P. McIver & Susan Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 JUST. SYS. J. 123 (1991).

¹⁰⁸ Sander, *supra* note 26, at 126.

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that a disputing method which moves painstakingly and expensively toward ultimate truth gives the parties with greater expertise and resources a big advantage in negotiating settlements, allowing them to engage in a war of attrition as part of the settlement strategy. Time appears generally to have been the ally, albeit not a completely successful one, of increased compensation for the claimants. The trust funds created to pay claims by asbestos maker Johns-Manville and Dalkon Shield maker A.H. Robins, both of which filed for bankruptcy in the face of the claims, rely on some delay in the process of claims filing, review, and payment in order to generate revenue from investment of the core funds deposited for the settlement by the defendants.¹⁰⁹ Even the seemingly clear criterion of speed possesses some uncertainty when evaluating ADR and litigation alternatives.

Sander's suggestion for accommodating his list of occasionally conflicting considerations was expressly to recognize that it would be difficult to determine *ex ante* which disputing mechanism was most apt for a given dispute. With this recognition—one still overlooked, ignored, or forgotten by many ADR advocates—Sander proposed that the principal default system for disputing be a government administered clearinghouse or dispatcher that would preside over the initial intake of a matter, evaluate its suitedness to the major disputing options, and then assign the controversy accordingly. He termed his revised semi-judicial entity a Dispute Resolution Center,¹¹⁰ although it was quickly dubbed the "multi-door courthouse" and has continued to hold this *nom de plum* in discussions of ADR.¹¹¹

Sander's multi-door courthouse was one presided over by a "screening clerk" who should direct disputants to one of several "rooms" for further case processing. Combatants would be directed toward mediation, arbitration, administrative fact finding, a malpractice screening panel, an ombudsman, or even the plain old litigating court, depending on the screening clerk's assessment.¹¹²

The malpractice screening panel was to be composed of physicians and

¹⁰⁹ See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617 (1992) (describing Trust established for victim compensation and comparing to similar asbestos and agent orange facilities); but see RICHARD B. SOBEL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991) (criticizing Trust and implying similar criticism of other facilities as needlessly reducing compensation to the benefit of corporate tortfeasors).

¹¹⁰ Sander, *supra* note 26, at 130-32.

¹¹¹ Resnik, *supra* note 11, at 216 (citing commentators at n.19 and using the term "multi-doored" courthouse). I prefer the term "multi-door" courthouse for simplicity. It is also the term Sander himself used (but with a hyphen) in a subsequent article. See Frank A.E. Sander, *The Multi-door Courthouse*, *NATIONAL FORUM*, Vol. LXIII, No. 4, Fall 1983.

¹¹² Sander, *supra* note 26, at 131.

blue ribbon laity or judicial personnel and was justified by the technical complexity of medical matters and a concern for intercepting weak claims early in order to protect the medical profession.¹¹³ Like other parts of the article, Sander's enhanced focus on medical malpractice is a bit of a historical artifact. Policymakers in the mid-1970s perceived themselves in the middle of a medical malpractice "crisis" in which insurers were cancelling coverage, leaving doctors exposed and unwilling to undertake certain activities. Although then, as now, medical malpractice claims comprise a relatively small amount of civil actions, it weighed heavily upon the frontal lobes of lawyers, insurers, and politicians.¹¹⁴ In response, most states enacted changes in substantive tort law to give doctors more protection and to facilitate the formation of special insurance companies, often physician-owned, to provide malpractice coverage.¹¹⁵ Within a year of the Pound Conference, these reforms had been sufficiently successful, causing talk of a malpractice crisis to abate.¹¹⁶ There have been occasional resurgences of concern because, on the whole, medical coverage and exposure has generally not been viewed as one of the trouble spots of either tort or insurance law during recent years. In its place, product liability and pollution claims have largely taken center stage as the focus of concern about tort liability and insurance availability.¹¹⁷

Sander's vision of a multifaceted disputing center generally received a warm reception from lawyers across the ideological spectrum.¹¹⁸ However, his precise concept, even if well-executed, has weaknesses. Most obviously, it places great authority in the screening clerk, a bureaucratic official lacking the stamp of approval provided by the nomination-and-confirmation appointments or elections used to select judges.¹¹⁹ The multi-door courthouse also holds the potential to delay case resolution and increase costs when cases are assigned to a "room" in which resolution fails to

¹¹³ *Id.* at 129.

¹¹⁴ See Jean A. Macciaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990) (reviewing 1970s and contending crisis continues); Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act*, 52 BROOK. L. REV. 135 (1986) (describing New York activity during 1974-86 period).

¹¹⁵ Macciaroli, *supra* note 114; Rosen, Note, *supra* note 114.

¹¹⁶ See generally Patricia Danzon, NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1986); Patricia Danzon, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1982).

¹¹⁷ See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

¹¹⁸ See, e.g., Resnik, *supra* note 11, at 216-18.

¹¹⁹ At least this is my picture of the screening clerk based on Sander's presentation. See Sander, *supra* note 26, at 131.

occur: these cases eventually are shifted to another "room" or return to the court for "regular" adjudication at the option of any party unsatisfied with the status of the case after its initial or subsequent assignment.¹²⁰ Sander allowed, as he realistically must have allowed, that disputants would be permitted to seek full-scale litigation of the complaint and need not accept arbitration or screening panel responses to their claims or defenses.¹²¹ However, an adverse result from either arbitration or the screening panel would shift responsibility for costs to the disputant who pressed forward unsuccessfully to litigation.¹²² Although this would undoubtedly deter some weak "appeals" of adverse ADR results, it could hardly be counted on to weed them all out. Alternatively, cost shifting might discourage worthy challenges to adverse ADR results because of the potential financial penalty. Consequently, the multi-door courthouse concept can be criticized as both potentially increasing costs and perhaps undermining the accuracy and procedural values traditionally associated with litigation. Certainly, Sander's article, for all of its insight and creativity, springs from the same troubling well of crisis rhetoric that has driven the misplaced semi-reform efforts of the past decade.¹²³ Nonetheless, my intrinsic reaction to the multi-door concept is that it was, and remains, a sound one, albeit one in need of careful construction and administration. In Part II, *infra*, I suggest a variant of this approach that holds some promise for attaining the ADR goals of the Pound Conference organizers and as militating against the concerns of Weinstein, Resnik, and others.¹²⁴ Regardless of whether one is persuaded by endorsements or criticisms of the concept, Sander's multi-door courthouse concept and article retain visionary status. Although aspects of the ADR movement can be held responsible for the developments Resnik criticizes and Weinstein fears, these undesirable developments do not, by

¹²⁰ Sander does not expressly acknowledge this possibility when outlining the multi-door courthouse, suggesting that the case is on the downhill slope to termination as soon as it has been assigned by the screening clerk. His subsequent discussion reflects his understanding of the possibility, but perhaps an underappreciation of it. *See id.* at 131-33.

¹²¹ But Sander was not exactly overjoyed about having to make this concession, noting that "we are robbed of much-needed flexibility by the constitutional requirement of jury trial." *Id.* at 132.

¹²² *Id.* at 130.

¹²³ *Id.* at 133 ("In view of the desperate state of some of our civil calendars, it seems to me that the burden of persuasion should shift to those who maintain that the high costs are justified by unique advantages afforded by jury trials [and, implicitly, full adjudication]."). On the "Chicken Little" nature of modern crisis-based court reform rhetoric, see Robel, *supra* note 85.

¹²⁴ *See* Weinstein, *supra* note 1; Resnik, *supra* note 11; Nader, *Controlling Processes*, *supra* note 6; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

and large, indict the multi-door courthouse idea.¹²⁵ In some jurisdictions, the concept has been implemented (although not exactly as sketched by Sander) and largely applauded by its operators and inspectors.¹²⁶ Perhaps, as it enters young adulthood, the multi-door courthouse is ready for extensive prime time exposure.

C. Caveats for Discussing and Evaluating ADR

Part of the difficulty in discussing ADR and adjudication stems from something of a failure of the scholarly and political community to distinguish adequately among the varieties of ADR and adjudication. Although Sander's article is what might be termed an excellent start to the post-Pound Conference conversation, subsequent discussion has often done little more than note the superficial distinctions between ADR methods or list the posited *prima facie* differences between courts and other decisionmaking entities. An attempt to outline the potentially useful adoption of ADR methods by the courts requires some effort to avoid these oversights. In particular, the ADR-vs-Courts debate would be more useful if participants kept the following caveats in mind.

1. Distinguish Between Old ADR and New ADR

The foregoing historical sketch focused on what I call "new" ADR, the modern ADR movement of the past twenty to twenty-five years. To be sure, however, ADR existed long before Chief Justice Burger and the Pound Conference. I label these pre-1970 forms of dispute resolution "old" ADR. Although both movements share the commonality of being alternatives to courts and use many of the same processes or techniques (*e.g.*, arbitration), there is a palpable tension between "new" ADR and "old" ADR, which ADR advocates have failed to acknowledge and ADR opponents have probably overstated.

Old ADR has several identifying traits. In particular, it usually:

a) *is confined to a subset of industry.* A classic example is provided by guilds which arbitrate the application and enforcement of quality standards. The textile industry, for example, is subject to its own set of rules and has a

¹²⁵ A point Resnik acknowledges although she is skeptical of, or dismayed by, subsequent developments. See Resnik, *supra* note 11, at 217 ("Whatever the number of doors, the call was for access to and preservation of the courthouse.").

¹²⁶ See Erica Gray, *Multi-Door Courthouse, A Working Paper for the National Symposium on Court-Connected Dispute Resolution Research* (Oct. 15-16, 1993), in STATE JUSTICE INSTITUTE, *supra* note 6, at 91-109.

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subsidiary division of the American Arbitration Association.¹²⁷ The diamond dealers concentrated in a few European and American cities constitute an especially closely linked group of merchants with shared interests who have long operated under an arbitration system backed by formal, but effective, enforcement mechanisms.¹²⁸

b) *it involves a system of relationships in which the participants form virtually their own miniature society or fraternity and are likely to have repeated contact with one another.* The commodities merchants of the Minneapolis Grain Exchange, which provides for automatic arbitration of inter-member disputes according to its own rules and regulations, provides an example.¹²⁹

c) *involves commercial matters and commercial actors, as in the examples cited above.*

d) *focuses on issues of contractual interpretation or performance, often with recurring issues regarding quality, excuse of performance, adequacy of tender, or mitigation and amount of damages.* The custom of the industry, trade usage, or prior course of dealing between the disputants often provides the yardstick for determining rights and responsibilities.

As noted above, old ADR has been around for some time,¹³⁰ perhaps

¹²⁷ See American Arbitration Association, *Arbitration Rules for Textile Claims* (1995); see also MACNEIL ET AL., *supra* note 33, at App. IV. However, the arbitration clauses used in textile contracts and the American Arbitration Association rules for textile disputes are nearly identical to those of commercial and construction arbitration. See American Arbitration Association, *Arbitration Rules for Commercial Claims* (1995); American Association Association, *Arbitration Rules for Construction Claims* (1995). What may often differ by industry are the substantive norms of behavior, e.g.: When does an oral agreement count? Who is responsible if a shipment of raw material is late? When does a breach by the other party justify walking away from the remainder of a contract? How are damages calculated?

¹²⁸ See Lisa Bernstein, *The Oldest Law Merchant: Private Commercial Law in the United States*, (March 5, 1995) (unpublished manuscript, on file with author) [hereinafter *The Oldest Law Merchant*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

¹²⁹ See Rules and Regulations of the Minneapolis Grain Exchange (1995), in particular, Rule 4, which provides that in the event of a dispute between members, arbitration shall be automatic even if there is no arbitration clause in the disputed contract. An arbitration clause is required before a member company may insist on arbitrating a claim against an objecting nonmember, but a nonmember may insist on arbitration even in the absence of an arbitration clause. See also *Little Rock Grain Exchange v. Thompson*, 93 F.Supp. 571, 573 (E.D. Ark. 1950) (Grain Exchange acts as arbitrator between members and nonmembers).

¹³⁰ The major traditional treatises present their discussions under a background assumption that old ADR is the norm. See, e.g., ROBERT RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* (1984); G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION*

longer than the legal literature has traditionally acknowledged.¹³¹ Although old ADR has been characterized more by anecdote than rigorous study, it appears to have succeeded in many cases because it differs from courts in substance as well as procedure.

New ADR differs from old ADR in several respects in that:

a) *it is mass produced ADR that affects large classes of persons or entities* (e.g., all investors who open a discretionary brokerage account) rather than only the relatively small group of a trade guild such as the Diamond Exchange.

b) *one of the disputants is often a so-called "one-shot" player who is a stranger to the ADR forum while the other disputant is a "repeat player" who frequently contests matters in the ADR forum.*¹³²

c) *new ADR is far more likely than old ADR to involve personal rather than commercial matters.* A leading and troubling example of new ADR is the securities industry's insistence that brokerage house employees sign an agreement requiring arbitration of employment-related disputes.¹³³

(1984). Even the most recent and quite excellent major treatise on arbitration proceeds from the largely unspoken assumption that old ADR arbitration is the controlling arbitration framework. See MACNEIL ET AL., *supra* note 33, chs. 1-7 (1994) (although the treatise devotes substantial discussion to the problems of enforcing new ADR arbitration clauses; *id.* at chs. 15-21).

Although labor arbitration lies largely outside the scope of this article, I consider it a type of old ADR. See DENNIS R. NOLAN, *LABOR ARBITRATION LAW AND PRACTICE* 3 (1979) ("Private . . . disputes were organized in England in the 1860s, and in the 1870s, arbitrations were held in the Pittsburgh iron trade, the Massachusetts shoe industry, and the Appalachian coal fields."). In addition to age, labor arbitration shares other important characteristics of old ADR in that it results from a tangibly bargained agreement between two principals of roughly equivalent bargaining power and sophistication regarding the understanding of the impact of substituting an arbitration scheme for the default rule of adjudicating disputes. Although individual employees seldom are in this position vis-a-vis an employer (star professional athletes and sought-after CEO candidates being perhaps the leading exceptions), the union provides employees with representatives similar to that existing when two businesses contract for old ADR arbitration.

¹³¹ See MACNEIL ET AL., *supra* note 33, ch. 4; Bernstein, *The Oldest Law Merchant*, *supra* note 128.

¹³² See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (noting and outlining distinction between repeat players who frequently participate in litigation—and, by implication, other ADR processes—and one-shot players who have isolated and rare contact with courts and disputing).

¹³³ See *supra* notes 60-65 and accompanying text (discussing Supreme Court's 1991 *Gilmer* decision and controversy over mandatory employee arbitration contracts).

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d) *unlike old ADR, which usually centered on questions of contract interpretation and obligation, new ADR is far more likely to involve statutory questions and a range of legal issues rather than focus on contract text, industry custom, or prior actions of the parties.*

New ADR should not necessarily receive a different level of judicial scrutiny than old ADR merely because it is different. However, the converse is also true: new ADR should not necessarily be as readily endorsed and deferred to by courts simply because courts have chosen to defer to old ADR mechanisms. Unless similar analysis supports a wide judicial berth for new ADR, courts must make serious inquiry before giving the metaphorical rubber stamp of approval to new ADR.

Instead of making this sort of searching inquiry, however, courts have largely produced an unimpressive record of brittle formalism and shallow policy analysis when analyzing any form of ADR. Prior to the mid-1960s, courts were unduly hostile to even the comparatively benign, familiar, and congressionally authorized old ADR. In place of sensitive contract inquiry, the courts at first resisted old ADR on the basis of tortured construction,¹³⁴ a narrow view of statutory reach,¹³⁵ or a somewhat paranoid view of unconscionability.¹³⁶ Misplaced hostility to old ADR was mortally wounded

¹³⁴ See, e.g., *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 252 U.S. 313 (1920). The trial court in the Southern District of New York (Learned Hand, J.), the Second Circuit, and the Supreme Court (Oliver Wendell Holmes, J.) all found a broadly worded arbitration clause inapplicable because the clause spoke of disputes over "performance of the contract" and one party was completely denying the contract. Imagine trying this defense the next time you have an argument with Visa or Mastercard ("We don't have a dispute over late payment subject to arbitration; I deny the validity of the credit card agreement"; perhaps BankAmerica's credit card customers can use this in the wake of the *Badie* decision (see *supra* note 68)). The Federal Arbitration Act passed a few years later in 1925, but it was not until nearly 50 years later that the Supreme Court effectively overruled the *Korn-Og* approach to arbitration enforcement. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). But see *infra* note 136.

¹³⁵ See, e.g., *Bernhardt v. Polygraphic*, 350 U.S. 198 (1956) (refusing to enforce arbitration agreement on ground that state law forbid arbitration of such claims). *Bernhardt* was silently but effectively overruled in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which held that the Federal Arbitration Act creates substantive law in cases where it is applicable because of a contract evidencing a transaction in interstate commerce, thus making irrelevant state law sentiments about the propriety of similar arbitrations under state law. See also *id.* at 21, 23 (O'Connor, J., dissenting) (arguing in vain that *Bernhardt* was rightly decided and should control disposition of the instant case).

¹³⁶ See, e.g., *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). The court refused to enforce an arbitration clause in construction contracts because the objecting party alleged it had been "defrauded" into entering into an unfair ADR clause

with the *Steelworkers'* trilogy of labor arbitration cases in 1960¹³⁷ and appeared buried with the 1967 *Prima Paint* decision, which held that a defense of fraudulent inducement to contract was within the scope of a contract's arbitration clause.¹³⁸ However, even old ADR agreements will not be enforced unless they clearly cover a dispute.¹³⁹

Despite this occasional backsliding with regard to enforcement of old ADR, the court has simultaneously endorsed new ADR with a perhaps uncritical vengeance. Starting with the 1957 *Wilko v. Swan* decision, which read the Securities Act of 1933 to include a statutory prohibition on

providing for arbitration in New York. The *Moseley* holding is really more of an unconscionability opinion, although it is largely clothed in the language of fraudulent inducement. See Stempel, *supra* note 33, at 1397-98. It can also be ascribed to author Justice Hugo Black's occasionally embarrassing populism and fear of corporations and city slickers taking advantage of country folk. See, e.g., *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (enforcing contract clause designating agent for receipt of service of process); *id.* at 328 (Black, J., dissenting) ("Today's holding gives a green light to every large company in this country to contrive contracts which declare with force of law that when such a company wants to sue someone with whom it does business, that individual must go and try to defend himself in some place, no matter how distant, where big business enterprises are concentrated, like, for example, New York, Connecticut, or Illinois, or else suffer a default judgment."). Justice Black's notion that an unreasonably inconvenient forum may make ADR unconscionable is correct as a general principle but his application to it in commercial situations like *Szukhent* and *Moseley* seems demonstrably incorrect.

To the extent *Moseley* actually held that a party may avoid arbitration based on a claim of fraudulent inducement into the contract, it was overruled by *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). However, objections directed specifically to the making and validity of an arbitration clause may still preclude arbitration until a court has ruled on the objections. See *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-51 (1987); Stempel, *supra* note 32, at 280 n.85.

¹³⁷ See *United States v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Collectively, these cases, which all enforced labor arbitration agreements or awards, are referred to as the "Steelworkers' Trilogy." See Nolan, *supra* note 130, at 45-50. The approach of these cases has been influential regarding enforcement and review of nonlabor arbitration agreements as well.

¹³⁸ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1968) and *supra* notes 134, 136.

¹³⁹ See, e.g., *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995); *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643 (1986); *Twin City Monorail, Inc. v. Robbins & Myers, Inc.*, 728 F.2d 1069 (8th Cir. 1984) (although the Eighth Circuit's tortured construction rivals that of Judge Hand and the Supreme Court three-quarters of a century ago in *Korn-Og* (see *supra* note 134)).

predispute arbitration agreements between broker and customer,¹⁴⁰ the court moved toward the enforcement of such agreements not only rejecting defenses based upon the Securities Exchange Act of 1934¹⁴¹ and the 1933 Act,¹⁴² but also glossing over issues of contract formation, knowing consent, adhesion, unequal bargaining power, and unfair surprise.¹⁴³ Perhaps its dimmest hour came in *Gilmer v. Interstate/Johnson Lane Corporation*,¹⁴⁴ which required arbitration of an Age Discrimination Act claim according to the literal language of an arbitration form the worker was required to sign as a condition of employment. *Gilmer* reached this arguably oppressive result notwithstanding the Federal Arbitration Act's language making it inapplicable to any "contract of employment."¹⁴⁵ With reasoning that would make even a sophist blush, the Court concluded that the agreement was not the worker's "contract of employment," but was instead merely a collateral requirement of the New York Stock Exchange that raised no serious issue concerning the meaning of the Federal Arbitration Act.¹⁴⁶

Recently, the Court, perhaps owing to the arrival of Justices Ruth Bader Ginsburg and Stephen Breyer, has mercifully stepped back from the rigid harshness of *Gilmer* in cases like *Mastrobuono*,¹⁴⁷ which upheld an investor's arbitration award of punitive damages in the face of contract language that made a colorable but sneaky invocation of New York common law precedent holding that an arbitration award of punitive damages violates "public policy" (on the view that only the august and sagelike judiciary may impose punishment).¹⁴⁸ However, in the same, most recent term, the Court has reiterated the broad sweep of the interstate commerce scope of the Federal Arbitration Act,¹⁴⁹ but acted to limit an arbitrator's power to

¹⁴⁰ *Wilko v. Swan*, 346 U.S. 427 (1953).

¹⁴¹ *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

¹⁴² *See Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

¹⁴³ *See Stempel*, *supra* note 33, at 1383-90.

¹⁴⁴ 500 U.S. 20 (1991).

¹⁴⁵ *See* 9 U.S.C. § 1 (1994).

¹⁴⁶ 500 U.S. at 24-27.

¹⁴⁷ *Mastrobuono v. Shearson/Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995).

¹⁴⁸ *Id.* at 1217-21. The New York ban on arbitrators awarding punitive damages is based on *Garrity v. Lyle Stuart*, 353 N.E.2d 793 (N.Y. 1976), a case with rationale and result widely criticized by commentators. *See, e.g.*, Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529 (1994); Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart Reconsidered*, 66 *B.U. L. REV.* 953 (1986).

¹⁴⁹ *See Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995) (enforcing arbitration clause in home pest control contract and rejecting state court's abrogation of it

adjudicate a commercial dispute of seeming old ADR proportions.¹⁵⁰

In short, Supreme Court arbitration law has been something less than a hallmark of either consistency or reason. This results in large part from the Court's inability or unwillingness to recognize that old ADR and new ADR differ, and therefore, new ADR agreements, although deserving of enforcement in many, perhaps most, cases, nonetheless require a more sensitive analysis solicitous of the noncommercial one-shot players frequently found on what might be termed the "receiving end" of the brunt of mass produced and imposed arbitration clauses.¹⁵¹ Equally important, a more sophisticated assessment would prevent the broad brush criticisms of arbitration and ADR that border on hysteria merely because a matter is not presided over by a judge.¹⁵²

In short, distinguishing between old and new ADR should improve judicial regulation of ADR. In particular, the history of the waxing, waning, and renewed waxing of judicial enthusiasm for old ADR may have some lessons for the current debate. Moreover, studies of the more closely knit old ADR communities may suggest that courts and policymakers should be skeptical of ADR applied in situations that differ too greatly from those communities that have been the historical cradle of old ADR.¹⁵³

2. Distinguish Between ADR That Brokers Settlement and ADR That Acts as a Surrogate for Adjudication

ADR methods can be viewed as a continuum ranging from those that are largely adjudicatory, but proceed in a manner that differs from that of courts to those that are exclusively designed to attempt to arrange a settlement, but have no significant decisionmaking authority. Binding

merely because parties did not contemplate interstate activity; test for applicability of Federal Arbitration Act under 9 U.S.C. § 2 is whether transaction has significant aspects of interstate commerce, a standard satisfied by interstate transportation of materials used in transaction). At roughly the same juncture, however, the Court suggested that the reach of the Commerce Clause and statutes based on it are not limitless. *See, e.g., United States v. Lopez*, 115 S. Ct. 1624 (1995) (federal law attempting to criminalize drug activity near schools unconstitutionally exceeds permissible reach of Commerce Clause).

¹⁵⁰ *See First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995).

¹⁵¹ *See Stempel, supra* note 33.

¹⁵² *See Stempel, supra* note 32.

¹⁵³ In particular, courts and legislators might ask whether the "market" that created old ADR and permitted it to flourish for most of the 20th Century suggests that significant state "subsidies" of ADR, particularly new ADR, is a mistake. *See infra* notes 197-98 and accompanying text (regarding the subsidization question).

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arbitration is perhaps the best example of the former, and noninterventionist mediation is perhaps the best example of the latter.¹⁵⁴

The judicial settlement conference might be regarded as an example of the latter as well, particularly prior to the mid-1970s (the Pound Conference demarcation point rears its head again). During the past 20 years, however, especially since being granted more express authority in the 1983 Amendments to Federal Civil Rule 16, judges have frequently combined settlement conferences with either rulings on disputed issues or foreshadowings of rulings. Even where the matters at issue are not technically dispositive, this sort of judicial activity is sufficiently interventionist to muddy the definitional waters. For example, if a judge suggests that he will order certain documents produced notwithstanding a claim of privilege, this may exert a powerful pull on the threatened litigant. It was, of course, this melding of communication and coercion that prompted Resnik to inaugurate the managerial judging debate.¹⁵⁵

Despite these sometimes troubling aspects of judicial settlement efforts, the settlement conference remains more on the settlement end of the continuum since the conference itself involves no authoritative rulings. Authoritative judicial decisions, of course, come in separate orders, can be challenged accordingly, although often not until after final judgment, and fall in the middle of my posited continuum. They are adjudicatory acts often designed to spur settlement even more than to move a case toward judicial decision.

The various hybrids of mediation, evaluation, arbitration, and adjudication all fall at different points in the fuzzy middle of the continuum that I am suggesting. For purposes of the instant analysis, it is not as important where they fall. What is important is the distinction between pursuing settlement through alternative means, and pursuing decision through alternative means.

¹⁵⁴ I am assuming for the purposes of making this point that the mediator is purely a facilitator of conversation between the disputants and does not render opinions designed to foreshadow adjudicatory results should the parties press on. See Fla. Stat. § 44.1011 (defining mediation as facilitation of voluntary settlement); see *infra* notes 224-91 and accompanying text (discussing varieties of mediation and recommending that courts offer mediation services of substantial formality, with mediators who eventually offer judgments where parties have counsel during mediation sessions). However, even this "pure settlement" line is hard to hold since the rendering of a neutral opinion on a claim may well stimulate settlement. See *Florida Dispute Resolution Center, The Resolution Report* (Vol. 10, No. 2) (July 1995) at 3 (mediator sanctioned by Disciplinary Panel for rendering legal opinion). For the most part, however, I view these sorts of ADR activities (e.g., ENE, summary jury trial) as quasi-adjudicatory events designed to stimulate settlement, rather than settlement efforts per se.

¹⁵⁵ See *supra* notes 59-60 and accompanying text.

The traditional means of prompting settlement was an early and firm trial date.¹⁵⁶ It provided the threat of adjudication prompting parties and counsel to bargain harder in the "shadow of the law."¹⁵⁷ At least according to the conventional wisdom, courts did not waste time jawboning to attempt settlement; settlement took care of itself if the court just took care of adjudicating. The increasing civil court backlogs have made the trial date of reckoning a paper tiger, particularly in urban areas. In reaction, the judiciary has attempted to procure settlements through alternative means:

Managerial judging;
Mandatory conferences;
Tighter pretrial deadlines;

Disclosure in lieu of discovery to force the parties to "place their cards on the table" in the belief that this will encourage swifter settlement at lower legal cost;¹⁵⁸

Various regulations making continued litigation onerous so that parties are effectively urged to settle rather than undergo the pain of litigation;¹⁵⁹ and

ADR forms which either attempt to provide exit from the court system or the settlement-spurring function once held by the fixed, firm, early trial date.¹⁶⁰

¹⁵⁶ Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991) (citing Richard L. Williams, J. (E.D. Va.)).

¹⁵⁷ To again use the memorable phrase of Mnookin & Kornhauser, *supra* note 30.

¹⁵⁸ See Winter, *supra* note 83 (outlining this aspect of rationale for disclosure requirement).

¹⁵⁹ Although I know many will disagree, I find the expansion of local rules and standing orders that micromanage the practice of law to function much like unrealistic pretrial deadlines in that they work to make litigating so unpleasant (as if it were not intrinsically unpleasant; remember Learned Hand's dictum that he dreaded a lawsuit more than anything but sickness or death) that counsel (who must jump through the variegated but nondispositive hoops) and litigants (who must help by producing documents, attending meetings, etc.) essentially settle to stop the increased pain of litigation. Subrin captures a part of my cynicism when he sketches the burdens of litigating in the District of Massachusetts:

[T]he Federal Rules require only a complaint and an answer. Under the Massachusetts Federal Local Rules, however, the lawyer now finds that she is told what to discuss with her client, what to discuss with her opponent, what to discuss with the judges and to then file a written certification and a written joint plan—a plaintiff's lawyer must give the other side a written settlement demand. Moreover, additional rules strongly suggest management conferences and a "final" pretrial conference, each with their own detailed set of rules.

Subrin, *supra* note 36, at 1161 (citations omitted).

¹⁶⁰ See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War*

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Despite its imperfections, ADR strikes me as the best, or at least the least objectionable, of this arsenal of options for reducing judicial caseloads. The promoters of settlement frequently forget to count all the costs. For example, the disclosure rules were designed in part to reduce caseload and to remove discovery disputes from the court. Even if they work this way, and I have argued that they do not and will not, the disclosure rules nonetheless impose costs on counsel and clients. Whether these costs are greater than any savings of "hard core" judicial costs, the time invested by judicial employees, is quite literally anybody's guess at this juncture.¹⁶¹ Similarly, we have no real proof of whether managerial or settlement judges spend more time disposing cases by managing and jawboning than they would if they simply adjudicated and let settlement follow as a matter of course, and even allowing a few cases to actually proceed to final judgment.

My own opinion is that the net cost to society is higher with the managerial or settlement model of judicial activity than with the decision-rendering model and would be proven so if we could literally place an opportunity cost meter on judges, judicial employees, lawyers and their staff, litigants and their agents. By contrast, ADR that "mimes adjudication"¹⁶² fulfills a good deal of the "firm trial date or shadow of adjudication" pressure that creates a market for settlements with minimal transaction cost, particularly directly publicly funded or subsidized transaction costs. In addition, "when ADR mimes adjudication, the critique of ADR as a lawless or factless process loses strength."¹⁶³

If one agrees, however, the obvious next question is why society will simply not commit more resources to litigation and forgo quasi-adjudicatory ADR as either an alternative forum or a spur to settlement. First, the practicalities of the contemporary era require it: the body politic will not support sufficiently expanded traditional adjudication for reasons of both funding and perceptions of ineffectiveness or excessiveness. These perceptions may be incorrect, but they are real and only subject to modest alteration in the near future. Second, court-connected ADR has the potential to offer the benefits of litigation when they would otherwise be unavailable, because civil adjudication is currently rationed by scarcity to some extent. The political culture will not support a phalanx of new Article III judges and courts but appears willing to provide increased ADR. My argument is

With the Profession and its Values, 59 BROOK. L. REV. 931, 956 (1993) (noting that court system has moved "from trials to dispute resolution").

¹⁶¹ See Stempel, *supra* note 4, at 342-54.

¹⁶² To again borrow a memorable phrase from Resnik. See Resnick, *supra* note 11, at 263.

¹⁶³ *Id.*

that this ADR should be designed to provide a decision rather than merely to explore settlement from increasingly varied angles. Although others disagree, I remain convinced that at least the legal profession's discussions and decisions about ADR will improve if it observes the distinction between settlement ADR and decisional ADR.

3. *Address the Political and Distributive Issues Forthrightly*

There is a more controversial history to the modern ADR movement than is admitted by most commentators, particularly the proponents of new ADR. As noted above, the Pound Conference can be criticized as an effort by more politically conservative social forces to reverse the gains obtained by some groups through litigation during the 1960s and early 1970s.¹⁶⁴ ADR should invoke neither paranoia nor Pollyannaism, but without doubt the battle over ADR has a political and distributive dimension. It is no coincidence that ADR's biggest boosters are commercial organizations, employers, insurers, political conservatives, and Republicans. Its most vociferous critics are liberals, minorities, Democrats, and academics. To the extent that new ADR succeeds in imposing privatized brute creditor enforcement or unfettered employer discretion to treat employees as though state and federal legislative protection had ceased to exist, it will deserve the contempt of its critics. To the extent that new ADR strips the public of adequate recourse to fact finding and legal inquiry with no significant return, new ADR constitutes a political victory (undesirable in my view) by the legal-political Right over the Moderate and Left.¹⁶⁵

But increased ADR does not necessitate oppressive ADR. Any

¹⁶⁴ See *supra* notes 42-60 and accompanying text.

¹⁶⁵ This is not to suggest that the Leftist political viewpoint should be preferred to those of the Center or Right. My own political self-image is decidedly centrist. But I also give traditional adjudication high marks for reaching correct results in given cases and generating wise rules of law. The adjudication process, despite flaws, tends toward the substantively rational. See Owen M. Fiss, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990). To the extent that some political actors, including the citizenry, wish to reduce the role of adjudication in American politics, this suggests to me a relative decline in reflective decisionmaking and substantive rationality—a bad development. The unspoken drawback of a strong judicial role, even if one accepts my argument, is the so-called countermajoritarian difficulty: the fear that the very job security that allows judges to be substantively rational and deliberative will produce philosopher kings or the unfair imposition of minority viewpoints on society. Although this concern is obviously legitimate, it is also frequently overstated. So long as a strong traditional judicial system functions within a larger system of checks and balances, it is likely to deliver more social benefit through rationality than detriment from undermining democracy.

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development can have modern benefits but historically tainted roots (e.g., public education, which was motivated in part by a desire to socialize recent immigrants into being "real Americans"). Anti-claimant, anti-rights underpinnings of the court reform movement should not blind observers to the value of ADR. Just the same, the complex political history of ADR suggests that sweeping and private ADRization of the nation would unwisely diminish the rights of some Americans.

Even doctrines historically helpful to individual rights such as federal supremacy, which aided the enforcement of civil rights legislation in the face of local resistance, can become oppressive when applied uncritically by ADR proponents insensitive to the political aspects of ADR. For example, the First Circuit stymied Massachusetts' efforts to soften the occasionally mechanical and sharp sweep of the new ADR by regulating the formation of arbitration agreements.¹⁶⁶ According to the court, this effort as applied to securities account agreements was preempted by the Federal Arbitration Act.¹⁶⁷ Although the issue was a close doctrinal contest, one might have expected some judicial solicitude for the state's consumer protection efforts, especially when an "erroneous" decision in favor of the state would need to survive potential alteration by a Congress favorably inclined to ADR (both old and new).¹⁶⁸ Instead, the court, through actual or feigned obliviousness to the political and social issues raised by new ADR, rushed to federal supremacy and ran roughshod over competing considerations.

My goal, at least for this article, is not to choose sides and pick fights on specific issues. My point is simply that most decisions about the role of ADR and the courts will have at least some distributive effect, or occasionally even a substantial or highly partisan impact. Rather than ignoring it, legal policymakers should attempt to identify it. They will probably not be able to eliminate it. However, they may be able to minimize it or counteract it. They may even want to accept or embrace it as an advance over the status quo. But they should at least try to know what they are doing.

4. Distinguish Between Private, Public, Voluntary, and Involuntary Means of Conflict Resolution

Although Judge Weinstein is a prominent exception,¹⁶⁹ many ADR

¹⁶⁶ See *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989).

¹⁶⁷ *Id.* at 1117-18.

¹⁶⁸ See generally Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583 (1991) (arguing that absent other compelling factors courts in doubt regarding close cases should impose burden of legislative correction on litigant best situated to bear that burden).

¹⁶⁹ See generally Weinstein, *supra* note 1; see also Lauren K. Robel, *Private Justice*

commentators tend to discuss ADR as though it matters not at all who operates the ADR mechanism and how participants come to participate in the ADR process. Thus, for the most part, debate over whether arbitration is preferable to adjudication has not differentiated between ad hoc arbitration (e.g., a couple agreeing that their clergyperson may divide property in the event of divorce), institutionally administered voluntary arbitration (e.g., a bank and a customer agree to AAA arbitration in the event of dispute), institutionally imposed involuntary arbitration (e.g., the NYSE requirement that employees arbitrate job disputes), or judicially annexed arbitration (e.g., a requirement that certain claims be submitted to nonbinding arbitration as a prerequisite to adjudication).

Although like so much of ADR, little is certain, my operating hypothesis is that privatized ADR poses more of the danger posited by ADR critics than does publically controlled or administered ADR. Although privatized ADR has the advantage of removing certain disputes or even whole classes of disputes from the admittedly crowded judicial system,¹⁷⁰ it holds substantial potential for unfairness at least so long as judicial review of private arbitration remains highly deferential. Although it has become fashionable to criticize public entities, I remain old-fashioned, and logical, in positing that a publically run ADR system would be less likely to favor a particular industry, entity, or viewpoint than would a private ADR mechanism established or administered by that industry, entity, or persons holding that viewpoint.

Simultaneously, a useful trial hypothesis is that the judiciary and the body politic should be less concerned about truly voluntary ADR. If ADR is voluntarily chosen (e.g., the Diamond Exchange merchants),¹⁷¹ it is unlikely to be unfair to the participants since most disputants are sufficiently rational to avoid selecting an adverse forum unless ignorant, foolish, or deceived. Even where this occurs, society's desire to respect even poorly made voluntary choices will counsel noninterference with the ADR selection.¹⁷²

and the Federal Bench, 68 IND. L.J. 891 (1993); Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42 (1988).

¹⁷⁰ See BROOKINGS INST. REP., JUSTICE FOR ALL, *supra* note 85 (also arguing that increased use of ADR will reduce cost and time required for resolving disputes).

¹⁷¹ See *supra* notes 127-31 and accompanying text.

¹⁷² See David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519 (1988) (arguing that American absorption of views of John Stuart Mill continues to result in public policy favoring individual choice even where the selections are arguably unwise); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (accepting minimal government regulation of individual choices but arguing that intervention or overruling is justified in certain circumstances).

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Of course, even if these two trial hypotheses are correct, they may be in conflict. For example, court-annexed arbitration or Early Neutral Evaluation (ENE) has the benign aspects of publicly administered ADR, but is imposed upon the parties irrespective of their actual preferences. Another example of this tension is private securities arbitration. Although it might currently be described as semi-voluntary and perhaps a candidate for acquisition by the judicial system, this would come at the cost of adding a large number of cases to the public system. In addition, it appears that traditions of integrity and market forces have produced NYSE arbitrations that are quite fair to and even solicitous of the involuntarily arbitrating investors, at least as to financial matters.¹⁷³ Under these circumstances, the optimal solution to concerns about the vastly privatized securities ADR would appear to be government-mandated disclosure and contracting protections and somewhat less deferential review of securities association ADR outcomes, rather than the wholesale takeover of this segment of ADR by the judiciary. Whether this approach is apt for ADR involving employment relations in the securities industry remains unclear.¹⁷⁴

Even this limited suggestion is, of course, subject to debate. A more ambitious inquiry such as the generally proper relationship between the public and private sectors of ADR obviously entails considerable controversy. However, to arrive at a stable national ADR policy, the questions of public or private authority over ADR and government tolerance for, or encouragement of, involuntary ADR arrangements must be addressed forthrightly and at length.

¹⁷³ See Constantine N. Katsoris, *Should McMahon Be Revisited?*, 59 BROOK. L. REV. 1113 (1993) (finding system of industry-imposed new ADR of securities brokerage arbitration to be largely a "level playing field" with sufficient regulation for fairness by industry).

Whether other securities organizations are as hospitable to investors presents a more difficult question. For example, some commentators have criticized arbitrations conducted under the auspices of the National Association of Securities Dealers (NASD) as being too favorable to broker-dealers. See, e.g., *Club NASDAQ*, WORTH (June 1995) at 111-13 (arguing that over-the-counter-exchange provides insufficient protection and enforcement for investors).

In addition, controversy surrounds industry-wide arbitration of employment disputes between the securities industry and its workers. See Symposium, *Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1501 (1995) (exchange between employee attorney Judith Vladek and brokerage house attorney Theodore Kresbach).

¹⁷⁴ Although I continue to believe that Congress spoke to the issue nearly 70 years ago when it stated that the Federal Arbitration Act does not apply to "contracts of employment." See 9 U.S.C. § 1 (1994); Stempel, *supra* note 62.

5. *Appreciate the Extent to Which Metaphor Can Distort Analysis*

Similarly needed by policymakers is an effort to assess ADR free of the limiting visions imposed by our own concepts of adjudication. A good deal has been written in the past few years about the power of narrative and symbol. Although the "call of stories"¹⁷⁵ undoubtedly has an influence over our beliefs and conclusions, the impact is not uniformly positive. Efforts to talk rationally, dispassionately, and empirically about dispute resolution have fallen prey to the emotive power of a batch of conflicting visions regarding conflict management and resolution. Various camps in the dispute resolution debate have adopted these visions so strongly that they have become reflexive and unrealistic proponents or opponents of tinkering with the judicial system.

Among the imagery prisms governing views of adjudication is the vision of justice as a humanist temple. Under this view, the quest for full justice in each individual dispute is of the utmost importance to society, and thus, demands substantial investment of public resources and a preference for meticulously fair process, such as substantively rational and objective consideration of the issues presented, and involved means of ensuring the quality of adjudication. In a variant or subset of this vision, adjudication entails considerably more than the refined resolution of disputes: it also involves a major role for the judiciary in articulating norms of conduct. The quest for justice becomes more than that and has aspects of a nonsectarian morality play or deliberative effort to achieve civic virtue.

Another vision is justice as an assembly line. In this view, the main role of courts is to furnish consistently and inexpensively an acceptable product—final dispute resolution. The product need not be of uniformly top quality and certainly need not be customized so long as benefits to society, from dispute resolution, outweigh individual dissatisfaction or error costs. Either courts or another entity might fulfill this role.

A variant of these views might employ a retailing analogy. To those favoring finality, there may be support for "justice as a mall," in that it argues for some degree, perhaps considerable, of contestant choice as to the general form of disputing, but does not provide customized or high cost dispute resolution unless the contestant is willing to invest substantial costs through queuing and paying for full dress adjudication. To those favoring accuracy or context-appropriate results justice is not a mall, but a boutique in which the contestant may receive more individualized and higher caliber dispute resolution. One alteration of this approach might see justice as a

¹⁷⁵ See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

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transaction: whatever goals and format are agreed upon by the contestants becomes by definition the favored approach and should be enforced by society. The judicial role would be limited to questions of voluntarism and would not seek to require more adjudicatory investment than the parties desire merely on grounds of public interest in the outcome.

Other visions exist of justice as a bureaucracy, as an incentive structure, or as a release valve for social pressure. The main divide in these visions appears to be the conflict between case processing versus value definition and norm articulation. Regardless of the correctness of either vision, these labels can cloud assessments of ADR efforts. Furthermore, the vision of a justice temple that attracts one adherent may repel the citizen who desires only an assembly line of finality in its stead.

An example of the degree to which different concepts of "good" adjudication can distort or exaggerate assessments is provided by differing views of the activist judge. Those who subscribe to the justice as a temple vision may be unduly hostile to any informality in adjustment of the litigation process. A perhaps apt example for this conference is Linda Mullenix's recent criticism of Judge Weinstein's style of judging, particularly his flexible and innovative approaches to mass torts.¹⁷⁶ Mullenix commented, "I prefer judges in their robes, and on the bench."¹⁷⁷ Mullenix makes a number of sound and useful observations about the approach of the judiciary to mass tort claims when she criticizes the increasing settlement of such ADR claims, particularly resolution that comes from what a critic might term "lumping" them together and "homogenizing" them by formula into portions that may not do a very good job of reflecting either fault or legal responsibility. Mullenix then excessively assaults Weinstein's methods by suggesting that he has moved from a role of innovative judging to that of philosopher king.

Although Weinstein is no stranger to controversy and is perhaps deservedly criticized,¹⁷⁸ I resist the notion that his style or methods of case

¹⁷⁶ See Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994) (discussing Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994)).

¹⁷⁷ *Id.* at 590.

¹⁷⁸ See, e.g., the tug and pull between Judge Weinstein and the Second Circuit on the issue of Rule 11 sanctions in: *Eastway Constr. Corp. v. City of New York*, No. CI 84-0690 (E.D.N.Y. 1984) (Weinstein finds Rule 11 gives judge discretion over whether to sanction frivolous claim and elects not to impose sanction); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (Second Circuit finds Rule 11 mandates imposition of sanction and remands for sanctioning); *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986) (Weinstein effectively "overrules" Second Circuit order that he must impose sanction by ordering sanction of only \$1,000 against commercial entity where

disposition reflect undue zeal, hubris, or insensitivity. Rather, I see Weinstein, along with Judge Sam Pointer in the breast implant litigation¹⁷⁹ and Judge Robert Mehrige in the Dalkon Shield litigation,¹⁸⁰ as doing their best to solve seemingly intractable problems for which the judicial system was not designed. Although their methods and decisions should always be open to free criticism, we should hesitate to assume arrogance or illegitimacy simply because their decisions violate a particular idealized vision of adjudication. In the absence of clear answers or established custom, the activist judge faced with novel problems attempts to "satisfice" through the exercise of discretion and nontraditional dispute resolution such as sampling, settlement, use of special masters, trust funds, and the like.

6. *Focus More on a Key Conflict of Values: Individualism vs. Collectivism*

Critics of judicial management, discretionary justice, and activist judgments have a point in asserting that perhaps flexibility and individual case management is the enemy of justice in some cases. For example, perhaps some mass tort cases would work out better if the courts took them as a queue of individual litigation disputes, started trying representative cases, and left it for purely private settlement activity to devise any alternative means of resolving the lawsuits. Perhaps every case—even every

claims found frivolous resulted in approximately \$50,000 cost to defendant); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (requiring Weinstein to impose sanction of at least \$10,000).

See also Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986) (criticizing Weinstein for granting summary judgment to defendants against opt-out plaintiff's claim in Agent Orange litigation in view of factual issues as to this particular plaintiff's exposure to dioxin and damages). In a continuing legal education presentation that I attended in Minneapolis in 1984, Nesson was a featured speaker and ascribed Weinstein's decision to the Judge's desire to ensure that the Agent Orange class action "held together," requiring that opt-out claimants be discouraged from attempting to obtain more by verdict than they could by settlement. See generally PETER SCHUCK, *AGENT ORANGE ON TRIAL: TOXIC DISASTERS IN THE MASS COURTS* (1986) (noting controversy but generally praising Weinstein's approach to the case); Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267 (1988) (reviewing Schuck's book and suggesting that classwide resolutions of mass torts may create injustice).

¹⁷⁹ See *Lindsey v. Dow Corning*, No. 94-P-11558-S, No. 94-P-1558-S CIV.A., 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

¹⁸⁰ See *In re A.H. Robins*, 880 F.2d 694 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989) (affirming district court approach).

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case within a class—deserves to be decided, by a form of decisionmaking ADR, if not full dress litigation. Obvious possibilities, in lieu of classwide settlement or claims tribunals, are streamlined procedures such as special mastering; arbitrations within a class subject to judicial direction; neutral evaluation as a precursor to either an arbitrator's or master's decision; a presumptive, but not preclusive or punitive, schedule of benefits for successful claimants; or limited review of the individualized assessments of fault, causation, or damage. Although this would not be optimal dispute resolution as we traditionally think of it, it might well be preferable to judicially imposed or cajoled mass settlements.

One possible avenue for both those who prefer package solutions and those who wish to see more individual determinations for those unfortunate enough to be part of a massive litigation event is to give courts more power to consolidate matters, and therefore to attack the threats of inconsistency and diffusion. In mass tort cases, federal courts perhaps should be able to bring all similar cases under federal control regardless of the normal ground rules of subject matter and personal jurisdiction. In this way, opt-out runaway verdicts might be less likely to erode attempts at global settlements. But without such idiosyncratic adjudication, the real story of mass tort claims might never emerge. Ultimately, society must come to grips with the question of whether some inefficiency and dispersion of outcomes is the price it pays for federalism, individualism, or finality—a question thankfully beyond the scope of this article.

7. Deal Expressly With Another Key Issue: Consent vs. Coercion

As discussed above, the recent ADR enforcement jurisprudence of the courts, particularly the Supreme Court, leaves much to be desired. Just as the legal system should differentiate between public and private decisionmaking, it should sometimes distinguish ADR agreements according to the quality of consent attending those agreements. Sometimes private new ADR is jammed down the figurative throats of individuals who only wanted a job. On other occasions, sophisticated commercial entities avoid arbitration where it suits their strategy and war chest. Neither seems logical or just.

A major failing of the courts has been the inability or refusal to deal sensitively with the question of the voluntariness of ADR, particularly new ADR. Arbitration of employment claims, particularly employment discrimination claims, has given many pause to question the wisdom of the judicial solicitude for private ADR that has dominated for a decade. Although current legal principles and doctrine provide a potential path to a

more defensible jurisprudence of ADR enforcement,¹⁸¹ this area may require legislative intervention, an unlikely prospect in the present climate. For the moment, it is sufficient simply to appreciate that the judiciary, although thankfully liberated from hostility to even benign, old ADR, has failed to police new ADR adequately. This imperfect oversight and the potential mischief of private new ADR in some circumstances should increase our willingness to experiment with more publicly administered ADR.

8. Appreciate the Differing Sophistication and Power of Disputants

In determining whether ADR should be private or public, stylized or informal, coercive or colloquial, decisionmakers must show an appreciation for the concrete contextual outcomes that befall different contestants and their disputes under different ADR regimes. Private ADR loosely policed by the courts may work fine for diamond dealers or two Fortune 500 corporations entering into a joint venture, but may be disastrous for sexual harassment claimants appearing before an industry board.

9. Differentiate More Precisely Between ADR Methods to Better Assess Them

Surely it is a truism that ADR methods differ in terms of their relative mix of speed, cost, accuracy, dignity, and theory-building. This, of course, is true in the abstract. For example, regardless of the precise nature of the dispute, flipping a coin is probably not what most of us want for dispute resolution of important matters. It scores high on the speed and frugality scale, but is at best a 50-50 proposition as to accuracy and provides no process values of dignity or guidance for future events, unless one is content to keep flipping coins and trust that things even out over the long run. The truism also holds when applied to particular cases. For example, a claim of

¹⁸¹ See Stempel, *supra* note 33; Stempel, *supra* note 62. As noted at *supra* note 67 and accompanying text, the EEOC has challenged mass imposition of arbitration agreements upon employees. The Ninth Circuit recently refused to enforce an arbitration clause against a Title VII gender discrimination claimant. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert denied*, 116 S. Ct. 61 (1995). Whether these episodes signal a different legal perspective on the issue or are merely isolated reactions remains unclear. See also *EEOC v. Kidder Peabody, Peabody & Co.*, No. M18-304, 1992WL73344 (S.D.N.Y. Apr. 2, 1992) (large investment banker or brokerage house unsuccessfully objects to EEOC investigation into its arbitration agreement practices with employees).

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theft between two mortal enemies will probably never be successfully resolved through mediation, but a boundary dispute between neighbors who are friends or are at least neutral is a good candidate for mediation. The Sander list of factors to consider remains a useful guide and has been largely confirmed by subsequent investigation.¹⁸² Consequently, any public or private institution promoting ADR must match the ADR method to the apt type of controversy. This need for effective matching augers in favor of a multi-door courthouse approach. However, the need to respect individual autonomy, even if exercised for strategic reasons, makes Sander's all-powerful screening clerk a problematic blueprint for the multi-door courthouse.

10. Recognize that Research Findings to Date Are Multifaceted: Although No One Study Settles the Debate, ADR Advocates Should Focus on the Criteria for Effective ADR that Appear to be Emerging

A variety of diverse findings emerge from ADR research.¹⁸³ This cautions against any hubris in suggesting any one path to dispute resolution's apogee, or any one multiheaded institution as the panacea. Some degree of cautious experimentation, continued study, and open-minded, ongoing reassessment seems in order. Nonetheless, respected work to date may suggest an emerging core of ADR "truths."

Symposium panelists Craig McEwen and E. Allan Lind, two prominent ADR experts, were in substantial agreement in encapsulating the matter. According to McEwen, a common finding in a variety of studies is that disputants want the opportunity to participate in "dignified, modestly formal proceedings" designed to declare a resolution of their controversy.¹⁸⁴ Lind concurred, noting that disputants have a "strong sense of fairness" and want their claims, and even those of their adversaries, to

¹⁸² See *supra* notes 100-04 and accompanying text.

¹⁸³ See State Justice Institute, *supra* note 6 (reviewing ADR research and finding large range of findings which may or may not be context-specific).

¹⁸⁴ Craig McEwen, Comments at Panel Discussion, Conference on Court Reform Implications of Dispute Resolution (Mar. 31, 1995). This finding is, not surprisingly, reflected in McEwen's own work. See, e.g., Craig A. McEwen, et al., *Lawyers in Everyday Life: Mediation in Divorce Practice*, 28 LAW & SOC'Y REV. 149 (1994); Craig A. McEwen, *An Evaluation of the ADR Pilot Project: Final Report* (Jan. 1992); Craig A. McEwen & Richard Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 2 LAW & SOC'Y REV. 439 (1986); Craig A. McEwen & Richard Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

receive a fair hearing. According to Lind, to be perceived as sufficiently fair, a dispute resolution mechanism must have adequate dignity, opportunity to be heard, benevolence (*i.e.*, the participants must view the process as having no hidden agenda such as aiding one side or merely sweeping the matter away), and neutrality.¹⁸⁵

I interpret both of these prominent scholars as suggesting that public, court-connected ADR efforts should be designed largely for decision-making, rather than cajoling settlement. Without doubt, some attempt at settlement through the aid of a third party with perspective should be attempted; therefore, what might be termed "structured initial mediation" seems useful as a universal front line of the multi-door courthouse. However, mediation efforts should move on and segue into a decisionmaking mode if the parties are unwilling or unable to make progress. McEwen essentially has suggested something like this by urging that courts provide brief abbreviated trials or arbitrations shortly after a claim is filed.¹⁸⁶ If this truncated, but not undignified or excessively casual procedure, is unsatisfactory to the parties, the litigation option should continue to loom on the figurative horizon. However, if McEwen and Lind are correct, and I believe they are, an institutionalized ADR system with a mediation-arbitration-litigation continuum is probably the optimal melding of adjudication and ADR. It not only provides important "settlement events"¹⁸⁷ facilitating voluntary resolution, but also provides sufficient decisionmaking procedure and authority to satisfy many litigants,¹⁸⁸

¹⁸⁵ E. Allan Lind, Comments at Panel Discussion, Symposium on Court Reform Implications of Dispute Resolution (Mar. 31, 1995). This finding is, not surprisingly, reflected in Lind's own work. *See, e.g.*, E. Allan Lind, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* (1990); Robert J. MacCoun, E. Allan Lind, Deborah R. Hensler, David L. Bryant & Patricia A. Ebener, *ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM* (1988).

¹⁸⁶ Craig McEwen, Comments at Panel Discussion, Conference on Court Reform Implications of Dispute Resolution (Mar. 31, 1995).

¹⁸⁷ Both McEwen and Lind noted the importance of settlement events to providing catalysts for case resolution by the contestants. This is hardly a surprising view to those who accept the "early and firm trial date" notion of traditional adjudicative judges. *See* Dayton, *supra* note 156.

¹⁸⁸ Some have suggested that more aggressive case disposition by pretrial method, particularly grants of partial or total summary judgment, is the optimal means of screening cases and reducing the full trial load. However, this method presents difficulties.

One fear is judicial error. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (arguing that increased drive to summary judgment

therefore making it likely that much adjudicatory business will be resolved without full dress trial, but retaining that option for litigants who desire it in cases that need it.

11. Overlooking the Role and Behavior of Lawyers Leads to Misanalysis

As many have remarked, American law, particularly legal education, remains a cult of the judge and has been so at least since the time of famed Harvard Law School Dean Christopher Columbus Langdell. Although the legal profession need not throw 150 years of tradition aside, it should at least realize the degree to which the ADR debate, like the civil procedure reform debate and other legal issues debates, has often proceeded as though lawyers and lawyering were merely fixed and predictable pawns of the system. Much as it pains me to say it, lawyers *are* pawns—but only to a degree. Their available movements and options are fixed by external factors. But lawyers also move with fluidity and resolve matters within the parameters created by external systemic factors. Judicial reform efforts, including ADR and litigation reform in general, must therefore not ignore attorney behavior, but instead must seriously consider the impact of any change on attorney behavior. This point was most directly made at the Conference by McEwen, who observed that lawyers are like any other human actor—they by and large respond rationally to the incentive structure within which they operate. Consequently, lawyers will act up and increase litigation costs, delay, and tension if it is professionally rewarding in terms of money, power, prestige, and peer acceptance. To the extent that a system rewards cooperation, compromise, or succinctness, lawyers will behave accordingly.¹⁸⁹

results in inappropriate and erroneous application often interfering with jury trial right).

Even if one has great confidence in pretrial disposition, the work of McEwen, Lind, and others suggests that litigants may be happier if their dispute is resolved by a decisionmaking event, even one short of full scale trial and appeal, rather than by motion on the papers. Furthermore, providing these mediation-evaluation-arbitration events may be less expensive and more productive than investing great judicial resources to decide cases by motion. Even Judge William Schwarzer, a leading proponent of summary judgment (and at times a spectacularly unsuccessful one: *see California v. Hartford Fire Ins. Co.*, 113 S. Ct. 2891 (1993); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) (reversing Schwarzer grants of summary judgment)), has noted that learning the record, digesting the motion and opposition, and rendering an opinion takes a great deal of time and mental energy. William Schwarzer, Remarks at the Association of American Law Schools Section on Civil Procedure Annual Meeting (San Francisco, Jan. 9, 1993).

¹⁸⁹ See Craig McEwen, Remarks at Panel Discussion, Conference on Court Reform

I summarize this important point in almost cartoon-like fashion due to the constraints on this article's already burgeoning length (which probably says something damning about my perception of incentive structures). However, in determining which ADR methods to incorporate, whether to demand their use, the order of use, and the means of challenge, the judicial system must consider lawyer reactions to any systemic change. Some initiatives will be self-defeating or inconsequential in the face of lawyer response. Although there is seldom a substitute for rigorous field study, a modicum of logical reflection on rational human behavior could go a long way toward avoiding mistakes or missed opportunities. To the degree we are certain of lawyer motivation and conduct, these factors counsel in favor of more determinate dispute resolution by courts, either through traditional adjudication or ADR, and less focus on nondispositive initiatives such as discovery reform or increased sanctions practice. The 1983 amendment to Rule 11 failed in large part because it paid insufficient attention to lawyer response. The 1993 amendment to Rule 26(a) appears largely ineffective for the same reason.¹⁹⁰

12. Idealized ADR Should Not Be Compared With Slipshod Adjudication—or Vice Versa

A major failing of ADR critics has been their consistent, but unspoken assumption that the goodness of traditional adjudication is largely beyond debate. Just as political conservatives (Republican Sen. Phil Gramm of Texas comes most quickly to mind) falsely pretend that all private entities are efficient and all government programs wasteful, the legal profession's litigation liberals (including me some of the time) falsely assume that adjudication invariably reaches the right result, that judges are fair and wise, that juries decide on the relevant merits, and that more rigorous procedure invariably provides posited protections to less powerful, popular, or politically influential litigants.

This perspective has perhaps its most graphic display in the work of Professor Owen Fiss. Fiss's wonderful essay *Against Settlement*¹⁹¹ makes a compelling and eloquent defense of adjudication and cautions against excessive ADR boosterism (making Harvard University President Derek Bok his foil).¹⁹² I find myself rereading the article in times of doubt about

Implications of Dispute Resolution (Mar. 31, 1995).

¹⁹⁰ Just as lawyers must be considered, so too must disputants. They will also respond according to the incentive structure provided by a disputing system.

¹⁹¹ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). See also Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

¹⁹² Derek Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38.

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being a lawyer or law teacher.¹⁹³ But without doubt, the article paints an inaccurate picture of the litigation world. To be sure, as Fiss asserts, courts frequently propound values and defend important rights, concepts, and institutions. Undoubtedly, the independence and reflective rationality of courts has protected the rights of many litigants, particularly society's most disempowered, but deserving. But just as surely, courts have been harsh and oppressive, arbitrary, ill-informed, and partisan.¹⁹⁴ When comparing ADR (e.g., arbitration before a typical AAA panel) with adjudication before the archetypical Fissian "good" court, most of us would prefer the court absent some additional knowledge about the claim or the desired costs of adjudication, although one might elect inferior but cheaper ADR for a small claim.¹⁹⁵ When faced with a bad or biased judge or a hostile jury, I will place my trust in the AAA panel any day.

Reviewing Fiss's article from time to time promotes irony as well as inspiration. His unspoken vision of a court is something like the Supreme Court under Earl Warren. But much adjudication today is presided over judges closer to William Rehnquist. Depending upon one's politics and current judicial composition, ADR can look increasingly attractive or negative.

13. *Recognize that Litigation Pathology Varies Greatly*

Despite my earlier attacks on lawyer behavior and suggestion that the system largely makes lawyers what they are, we should hesitate to adopt the pseudo-Shakespearean view too quickly. Although many lawyers, clients, and judges act irrationally through vexatious behavior, irrational refusals to compromise, or instigating diverting side shows (e.g., *sua sponte* requests for Rule 11 sanction motions), these are exceptions to the rule of largely

¹⁹³ And I have remained in the business, although this might have as much to do with my mortgage and wanting my kids to attend college.

¹⁹⁴ Among those who subscribe to this view is Robert Cover, Fiss and Resnik's casebook co-author (PROCEDURE (1988)). See ROBERT M. COVER, JUSTICE ACCUSED (1976); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). For a wonderful overview of the differing views of this influential trio, see William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989) (especially p. 974 in correspondence during writing of *Procedure* book, Cover describes Fiss as a "romantic" because of his "faith in courts to do justice").

¹⁹⁵ In my estimation, most disputants elect adjudication if time and money are no object, suggesting that adjudication may not be so bad after all. However, since time and money are invariably considerations for disputants operating in a world of finite resources, it is not contradictory that contestants may elect the ADR system even though there is nothing cosmically "wrong" with the litigation system in general.

professional, rational, and nonvindictive behavior by the system's participants.¹⁹⁶ If litigation pathology was as widespread as asserted by some critics, the system would have ground to a halt or imploded long ago. Although it is a mistake to ignore problems and potential for improvement, an unrealistically negative assessment may result in more harm.

14. *The "Subsidy Question" Should Be Addressed Rather Than Swept Under the Rug*

In order to deal fairly with warring institutions, we should deal fairly with the question of subsidized dispute processing. The conventional wisdom, advanced by Sander and others, posits that courts are highly subsidized since filing fees do not represent the full cost to government of operating courts.¹⁹⁷ By contrast, AAA and other ADR organizations typically charge higher fees, often related to the amount in dispute.¹⁹⁸

But these arguments ignore many factors. First, large fees are often not actually paid because the contestants have styled the matter in order to minimize the value of the claim or make it ambiguous. Although this may be a refreshing means of discouraging bombastic pleadings, it suggests that private ADR organizations are not as self-supporting as assumed. AAA, for example, also receives contributions and *de facto* or in kind support from the business community.

Second, private ADR groups, whether non-profit or for-profit, receive subsidies through tax benefits. By contrast, courts do not deduct salaries and expenses from tax returns. In addition, private ADR has often received quasi-subsidies in the form of active judicial enforcement of arbitration agreements and awards with minimal scrutiny over the correctness and legality of those outcomes. This occurs even where arbitration agreements are ambiguous, consent is questionable, or decisionmakers have rendered bizarre or questionable results. In essence, courts "pay" the costs of the more elaborate but nonetheless valuable appellate system.

¹⁹⁶ See Robel, *supra* note 169, at 901-04 (judges are driven more by considerations of professionalism than personal views and desire for public acclaim).

¹⁹⁷ See Sander, *supra* note 26, at 125-26; Robel, *supra* note 169, at 892-93.

¹⁹⁸ See AAA, COMMERCIAL ARBITRATION RULES (1993) (providing for sliding scale filing fees linked to the amount of the claim, ranging from \$500 for a claim up to \$10,000 to a \$5,000 filing fee for a claim of more than \$1 million). See also AAA, ARBITRATION AND THE LAW, 264 (1991-1992). In addition to the filing fee, AAA contestants also pay arbitrators for hearings exceeding one day in summation and pay additional administrative fees of \$150 per day in single arbitrator cases and \$200 per day in multiple arbitrator cases.

15. *Categorical and Formal Thinking Is Usually the Enemy of Wise Reform*

At the risk of pointing out the obvious, both proponents and opponents of ADR must be reminded that rigid or formulaic approaches are unlikely to be apt across a range of differing situations. Although the complexity of modern life drives many toward reductionism, common sense suggests that neither adjudication nor its alternatives is consistently good or bad for all types of controversies. This was an insight of Sander's proposed multi-door courthouse that remains worth remembering so long as it does not ignore the value of "normal" adjudication and contestant prerogatives.

16. *Prevent the Cult of the Judge From Creating Slouching Solomons*

The cult of the judge that dominates American law¹⁹⁹ has in modern form often glorified judicial intervention in ways outside the traditional role of the judge as umpire presiding over adversarial presentations.²⁰⁰ Some degree of judicial proactivism and creativity, however, is undoubtedly wise. Perhaps the best illustration of this point is Martha Minow's essay (written while she was still a law student) noting how King Solomon played the role of an intelligent activist judge.²⁰¹ When faced with the claims of two

¹⁹⁹ Certainly, legal education has been a cult of the judge. Nearly 150 years after Langdell, the typical coursebook is a collection of appellate court opinions in which students hang upon every word and attempt to dissect the opinion. In addition, the judiciary has been given considerable regulatory authority over court rulemaking and admission to the bar. Although much judge-bashing occurs as well, particularly in academic writings, legal education and commentary remains largely judge-centered. To the extent that congressional-executive-judicial tensions reflect a fundamental shift in judicial hegemony, this may be meaningful judge-bashing. See Stempel, *supra* note 5, at 686-89, 720-27.

²⁰⁰ The notion of an interventionist, result-oriented judge (and the result sought may be simple elimination of the case from the docket) was traditionally thought to be the creation of liberals in the legal profession. Today, the activist judge I describe is found across the political spectrum. Ironically, at the same time that judicial activity is probably less constrained (but not completely unfettered: see Weinstein, *supra* note 1, at 277-80) there appears to be a decline in what might be termed the "progressive" judicial tradition of interpreting law and deciding cases in a manner designed to further contemporary social values. See John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1326-28 (1990).

²⁰¹ See Martha L. Minow, *The Judgment of Solomon and the Experience of Justice*, in ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 447-464 (1979) (discussing the famous episode of Kings 4:16-28).

mothers each alleging maternity over a disputed baby, Solomon did not sit passively and attempt to discern the true mother based on what trial lawyers call "demeanor evidence" (e.g., Did one wring her hands? Did the other perspire? Did one speak haltingly?).²⁰² Instead, Solomon offered to impose a compromise by cutting the baby in half, eliciting responses that revealed the true mother. As Minow shows, a modicum of judicial activism may indeed be the tonic for solving a seemingly intractable dispute.²⁰³

But Minow's striking illustration should not lead judgophiles to champion routinized departures from the traditional role. Just as not every lawyer is Clarence Darrow, not every judge is Solomon. Without further revisiting the debate on managerial judging, it should be sufficient to note that there are dangers of mistake, favoritism, or lax administration of justice when judges become managers, settlement impresarios, or active participants in the dispute rather than reasonably detached umpires of adjudication.²⁰⁴ Although few would argue for a completely passive

²⁰² Which suggests that Solomon knew something many lawyers and judges do not: demeanor evidence is overrated. If Solomon had applied the conventional wisdom of less reflective trial lawyers (and, unfortunately, many judges and jurors), he would have been inclined to believe the nervous or halting witness, who may well have been the real mother too upset to speak in a composed fashion. Similarly, an emotional witness telling an unbelievable story may also sway a jury, as the acquittal of the Menendez Brothers demonstrates. See HAZEL THORNTON, *HUNG JURY: THE DIARY OF A MENENDEZ JUROR* (1995) (noting juror-author's belief that Lyle Menendez's testimony of being driven to murder his parents as a result of child abuse and fear of imminent harm from his father was feigned). All of this may suggest that, despite our reverence for the jury system, it is incorrect to criticize ADR measures as inferior because they place less reliance on the episodic trial arena event. However, some form of relatively sober gathering of interested parties may be necessary to make dispute resolution satisfactory to the litigants.

²⁰³ Note that the solution to the dispute was not a compromise.

²⁰⁴ See *Cippolone v. Liggett Group*, 975 F.2d 81 (3d Cir. 1992). See also *Liteky v. United States*, 114 S. Ct. 1147 (1993) (reiterating traditional view that judicial opinions formed about parties due to proper exercise of judicial function are not grounds for recusal). See, e.g., *Reserve Mining Co. v. Lord*, 529 F.2d 181, 185 (8th Cir. 1976) (removing district judge from protracted case on grounds of bias) ("Judge [Miles] Lord seems to have shed the robes of the judge and to have assumed the mantle of the advocate"). Of course, when judges become too detached they may become agents of injustice. See COVER, *JUSTICE ACCUSED*, *supra* note 194; William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 42 RECORD ASS'N BAR CITY OF N.Y. 948 (1987). For example, the removal of then-district judge H. Lee Sarokin from the famous tobacco litigation over which he had presided for a decade can be characterized by his defenders as occurring simply because he used intemperate language in making a correct discovery ruling based on the record before him, an essentially uncontroversial judicial activity that lacked the unorthodox case direction, *ex parte* contacts,

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judiciary calling balls and strikes (but not bothering to check for Vaseline in the pitcher's cap), the spectre of the meddling judge who does everything but make traditional rulings or conduct regular trials is similarly frightening.

II. THE "RIGHT" KIND OF MULTI-DOOR COURTHOUSE: PROMISING AVENUES FOR JUDICIAL INCORPORATION OF ADR

A. *Stressing the Public-Regarding Decisionmaking Potential of ADR*

With these caveats in mind, the notion of a more ADRized judicial system is not as threatening or depressing to me as it may seem to staunch defenders of adjudication. ADR will be improved and concerns over its accuracy and fairness mitigated if more ADR is brought under the control of the judiciary rather than left to the private sector or blocked by defenders of litigation. A continued role for court-connected ADR is not only wise, but necessary if society is to avoid the dangers of privatization raised by Weinstein.²⁰⁵

Unfortunately, judicially incorporated, annexed, or administered ADR initiatives have too frequently taken the form of efforts to encourage settlement or resolve disputes on a mass basis or by formula. These initiatives are often misplaced. The best type of ADR for judicial adoption is that which provides a definitive assessment of individual claims by a neutral figure acting within a regime of adequate process.²⁰⁶ It is on this point that Judge Weinstein has sometimes been controversial and at odds with the Second Circuit.²⁰⁷ Other judicially led efforts to engraft further

and other indicia of favoritism surrounding Judge Lord's removal from the *Reserve Mining* case. For a variety of views on Judge Sarokin's removal, see Panel Discussion, *Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence*, 58 BROOK. L. REV. 1063 (1993) (Remarks of John D. Feerick, Jack B. Weinstein, Monroe H. Freedman, Stephen Gillers, Joseph T. McLaughlin and Daniel J. Capra).

²⁰⁵ See Weinstein, *supra* note 1, at 284-98.

²⁰⁶ See *supra* notes 184-88 and accompanying text (noting observations at Symposium of Craig McEwen and E. Allan Lind).

²⁰⁷ See, e.g., *In re Eastern & Southern Dists Asbestos Litigation*, 129 B.R. 710, 743 (E.D.N.Y. 1995), *vacated and remanded*, 982 F.2d 721 (2d Cir. 1992); *In re Joint Eastern & Southern Dists. Asbestos Litigation*, 1993 U.S. Dist. LEXIS 10700 (E.D.N.Y. 1993); *vacated*, 14 F.3d 726 (2d Cir. 1993). See also, Linda S. Mullenix, *supra* note 176, at 589 (Weinstein "would transform judges into legislators, community workers, ministers, evangelists, administrative bureaucrats, and executive-branch policymakers"); Roger H.

settlement mechanisms upon the adjudicatory system pose even more problems.²⁰⁸

Most of the judiciary's future ADR efforts should be directed toward providing the contestants with a forum, a reaction to their claims, and a presumptive decision rather than attempting to hammer out a settlement. If the judicial system, including both ADR and traditional adjudication, functions effectively, contestants will reach appropriate settlements as a matter of course, needing only modest and traditional judicial settlement brokering.

In short, the multi-door courthouse structure remains a useful blueprint for courts, although not necessarily for the same reasons put forth at the Pound Conference or including the same mechanisms as envisioned by Sander. Of prime importance is the status of the multi-door courthouse as a courthouse. Placing ADR mechanisms under the control of the public sector is a worthwhile means of meeting the concerns of critics who have argued that ADR can too easily become a kangaroo court slanted against one of the disputants.

What these critics have not always appreciated is the degree to which their criticisms are driven by the private control of arbitration or other ADR methods and its mass imposition with little regard for the quality of consent displayed by those thought likely to be on the losing end of the ADR result.²⁰⁹ Although the experience of some inferior or specialized courts suggests a degree of favoritism for repeat players or litigants with superior

Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1988 U. ILL. L. REV. 69 (1989).

²⁰⁸ For example, both the adoption of the "English Rule" that the losing litigant pays the opponent's legal fees or the amending of Fed. R. Civ. P. 68 to provide greater fee shifting to the loser have been advocated as means of reducing court congestion and discouraging "needless" adjudication. However, both are bad ideas. See Stempel, *New Paradigm*, *supra* note 5, at 687-88 (observing that Bush Administration advocated "English Rule" in highly publicized "Quayle Report" and that former Federal Judicial Center Director Judge William Schwarzer has been an active advocate of toughened Rule 68). See also Katz, *supra* note 106; G. Marc Whitehead and Robert B. MacDonald, *The Truth About the "English Rule"*, 21 LITIGATION 3 (1995); Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J. L. REV. 425 (1986).

²⁰⁹ See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, (1987); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (making public-private distinction and arguing that adjudication is distinguished by formality, visibility, and decisional rigor); Stewart Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

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resources,²¹⁰ it seems impossible that public ADR faults of this type would rival those of private ADR forums, which at least have the potential to be aggressively partisan. In the modern era of public skepticism about the ability of government,²¹¹ including court,²¹² to pursue the public interest

²¹⁰ See Mark Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE*, VOL. I, *THE AMERICAN EXPERIENCE* (1982). Lazerson's case study of New York Housing Court concluded:

A legal system that encourages conciliation between landlords and tenants—two parties of vastly unequal resources—by curtailing the procedural rights of the weaker can only succeed in amplifying that inequality. Procedural formality recognizes inequality and attempts to compensate for it by making both parties conform to the same standards. Once formality is withdrawn the courts are transformed into collection agencies operating with the seal of the state of New York.

See generally Galanter, *supra* note 131 (repeat player litigants, and, by implication, ADR contestants, have inherent advantage of experiential knowledge, economies of scale, and greater rapport with tribunal).

²¹¹ See generally Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994) (reviewing history and literature of the social choice/public choice movement and finding no basis for judicial alteration of adjudication as counterweight to public choice influences on other branches of government); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (critic of public choice characterizes it as successfully creating great cynicism about government).

²¹² Most of the public choice/interest group/special interest chapter of government literature has focused on legislatures and administrative agencies. Perhaps overlooked is the degree to which chief executives and the judiciary are subject to the same influences. If public choice scholarship is correct and special interest politics and agenda order affect government activity at all, then surely the judiciary is a government function vulnerable to these influences. See Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989) (describing "interest group" and "Arrow's Theorem" branches of public choice literature). Whether courts are as susceptible to these influences as are other government activities remains an open question.

Surprisingly, few commentators have addressed this point and the unspoken conventional wisdom posits that courts are far less vulnerable to public choice pressures because of their comparative insulation from electoral politics. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that the institutional structure of courts makes them appropriate arenas for making policy decisions in a fair and nonpartisan manner); Maxwell Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995); Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995); Maxwell Stearns, *The Forest and the Trees: A Social Choice Theory of Standing* (1994) (unpublished manuscript on file with author) (defending restrictive standing doctrine of Article III courts on the ground that it reduces the

and rational social policy, suggesting greater public control of ADR may seem folly. However, the premise for this suggestion is simply that the public and political nature of the courts provide (all other things being equal) greater guarantees of fairness and justice on average than do similar dispute resolution mechanisms administered by private entities.²¹³ Although special interests or a rampaging majority may corrupt the public adjudication system, the system nonetheless is at least not established, funded, operated, and controlled by special interests or a rampaging majority.

In my view, the greater danger lies not from courts distorting the market of dispute resolution choices should they more aggressively enter the ADR business, but from allowing the courts to stand idly by as a "marketplace" of ADR while substantial market imperfection develops. Here, I differ from those who argue that courts should permit voluntary arbitration and ADR, but not mandate ADR.²¹⁴ Even if ADR is voluntary, it should be supervised and guided by the courts.

In particular, court-controlled ADR should attempt to level the playing field between:

opportunities of litigants for strategic behavior designed to reap gains from "agenda control" via the order in which test cases are brought).

²¹³ I realize that many scholars currently question the very coherence of the public-private distinction. See Henry J. Friendly, *The Public-Private Penumbra-Fourteen Years Later Distinction*, 130 U. PA. L. REV. 1289 (1982). Although I acknowledge that those who might be termed the "new critics" of the dichotomy have a point: the distinction has historically been overdrawn, failing to acknowledge the frequently blurred differences between public and private. The distinction continues to hold a core of intellectual coherence and value for analysis. Although "the people" may not always be in prudent control of governmental action, government action is on the whole likely to serve the interests of society at large while private regulatory agencies, whatever their merit, will have strong pressures to promote the self-interest of the controlling group.

Furthermore, many private organizations are not subject to institutionalized mechanisms for change. For example, elections happen on schedule (even recall is a possibility) but some private governing bodies effectively hold control until the death of the leaders. The most likely response of individuals to oppressive private organizations is "exit." You can always quit the Boy Scout troop if the scoutmaster's kid routinely bullies your son at the campouts while the scoutmaster and other leaders stand idly by. You could sue, too, I suppose, if the bully inflicts serious damage. Arbitrating before the regional council of the organization, of which the scoutmaster is a past president, provides a less attractive forum. "Quitting" a private ADR arrangement is considerably more difficult than dropping out of The Boy Scouts, a factor which supports a healthy public dispute resolution infrastructure that includes both classic adjudication and ADR.

²¹⁴ See Bernstein, *supra* note 107.

- (a) the naive and sophisticated;
- (b) the powerful and feckless;
- (c) strategic players and ingenues;
- (d) repeat players and one-shot players;
- (e) commercial and consumer interests.

According to the conventional wisdom, lawyers should do some of this leveling because of their essentially equivalent training and ability to invoke aspects of the system on behalf of their clients.²¹⁵ However, differing client resources and demands, coupled with variance among counsel, make private practitioners an imperfect equalizer, although one that has been too frequently overlooked by critics of ADR.²¹⁶ In both sponsoring court-connected ADR and reviewing private ADR, the courts have some role in balancing competing justice and efficiency interests in appropriate cases.

Consequently, my vision of the good multi-door courthouse, like Sander's, is one in which the disputing mechanisms and techniques are selected with the specific dispute in mind and imposed upon the contestants rather than elected voluntarily. Although mandatory ADR, particularly court-annexed arbitration, has been criticized as adding excess cost,²¹⁷ delay,

²¹⁵ See Stephan Landsman, *Introduction to the Adversary System*, in STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1-39 (1988).

²¹⁶ See *supra* notes 105-25 and accompanying text.

²¹⁷ See Bernstein, *supra* note 107. Bernstein's assessment, based on a game theory model of the litigation process in districts with court-annexed arbitration, is at odds with the conclusions of scholars like McEwen and Lind and others who have studied the issue. See, e.g., Lind, *supra* note 185. Bernstein's error, as I see it, is the failure of her model to account for the behavior-directing effects of mandatory court-annexed arbitration. Bernstein assumes that lawyers faced with mandatory court-annexed arbitration will make certain assumptions about the value of the claim, calculate the cost of the arbitration procedure, and likely expend more resources disputing than would be the case had they not been required to arbitrate. Bernstein thus concludes that mandatory arbitration is just another additional hurdle that will not add value except in cases where the stakes prompt parties to participate voluntarily. She then concludes that voluntary arbitration is useful but mandatory arbitration is counterproductive. She neglects to consider that the presence of the catalytic arbitration event can: (a) focus the parties and counsel sooner than would otherwise be the case; (b) trigger risk aversion as well as a desire to conform to social norms and be reasonable (or at least appear reasonable); or (c) interject a detached perspective to bear on the matter. Any of these impacts of arbitration may, apart from the game-theory modeling posited by Bernstein, prompt the parties to settle more readily or accept a reasonable arbitration award. Many of these benefits are lost if the court-annexed arbitration is not mandatory.

In addition, voluntary arbitration makes not only for lower usage but also a skewed pattern of usage. The parties and lawyers who opt for voluntary arbitration may not be the

or opportunity for strategic behavior,²¹⁸ the benefits of mandating participation in ADR outweigh the drawbacks. The most convincing research suggests that ADR is not likely to be sufficiently widely adapted to serve its function unless imposed on the contestants.²¹⁹ Lawyers trained in the adversarial model resist overtures for voluntary ADR, fearing that the opposition (perhaps aided by a partisan or insufficiently perceptive court)

omniscient rational utility maximizers of Bernstein's model. The entities most likely to benefit from arbitration may forsake it due to cognitive error. Only mandated ADR can avoid this. Other economic theoretical work about ADR has concluded that mediation can add value irrespective of the issue of volition. See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994) (suggesting the utility of compelled participation).

²¹⁸ The ADR literature has largely overlooked the troubling possibility that nonfinal, nonbinding disputing events such as mediation and arbitration can give less scrupulous contestants the opportunity to revise and polish their versions of events in order to falsely obtain a better ultimate result at trial.

For example, if a mediator reacts negatively to certain information, the party is likely to revise or eliminate the presentation of that information at trial, and so on. Similarly, the dramatic cross-examination at the arbitration that reveals a key defense witness to be a liar will probably not occur a second time at trial since the witness now knows how to couch negative aspects of his testimony in ambiguity and avoid being positioned to answer directly a hurtful question.

Because of this danger, it is important that a record be kept of all ADR events and that this record be available for presentation at subsequent ADR events or trial. An arbitrator, evaluator, or judge may wish to limit the use of this record to only compelling circumstances but it should be available to keep disputants "honest."

²¹⁹ Lind, *supra* note 185. See also ROBERT J. MACCOUN ET AL., *ALTERNATIVE DISPUTE RESOLUTION IN TRIAL AND APPELLATE COURTS* (1992); BARBARA MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990); E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* (1990); BARBARA MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN THE MIDDLE DISTRICT OF NORTH CAROLINA* (1989); Joshua Rosenberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343 (1992); Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855 (1993); Lloyd Burton et al., *Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program*, 14 JUS. SYS. J. 183 (1991); John Barkai and Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133 (1991); Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 119 (1991); Roger Hanson et al., *Court-Annexed Arbitration: Lessons from the Field*, 15 STATE COURT J. 4 (Fall 1991); Craig Boersema et al., *State Court-Annexed Arbitration: What Do Attorneys Think?*, 75 JUDICATURE (June-July 1991).

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will take advantage of them.²²⁰ But when forced to utilize arbitration, early neutral evaluation, or similar devices, lawyers and clients seem substantially satisfied with the process and the outcome.²²¹ Although the critics of mandatory ADR raise important concerns, their misgivings to date are based largely on anecdote, hunch, or modeling errors.²²²

This is not to suggest that the judiciary acquire, co-opt, or eliminate private ADR. Quite the contrary, private ADR should continue to play an important role. But private ADR should largely be the domain of situations in which the contestants have adequately consented to the forum²²³ or in which the contestant upon whom constructive or formalistic consent is imposed objectively and demonstrably receives something of value in return for submitting to the private ADR forum.²²⁴ For the most part, "old" ADR

²²⁰ See generally DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (noting common errors of reasoning based on misperceptions); Sunstein, *supra* note 172, at 1164-66 (noting that "myopia" and pre-existing frames of reference may prompt persons to voluntarily make objectively unwise decisions).

²²¹ See sources cited *supra* notes 184-88.

²²² See *supra* notes 218 and 219.

²²³ For example, predispute arbitration agreements could receive far more scrutiny than they do from courts according to the consent dimension. See Stempel, *supra* note 33.

²²⁴ Proponents of private ADR have long theorized that its use by commercial actors will enable consumers to receive value from lower prices occasioned by the vendor's lowering of prospective disputing costs due to use and enforcement of predispute arbitration agreements. Prof. Kenneth Scott so testified as an expert witness for BankAmerica in the *Badie v. BankAmerica* litigation (see *supra* note 68) challenging the Bank's use of arbitration clauses for consumer credit accounts. See Hal Davis, *Banks Follow Brokerages: Arbitrate Yes, Litigate No*, NAT'L L.J., Sept. 12, 1994, at B1, B3.

However, there is a notable absence of any evidence tending to confirm either (a) that mass privatized arbitration really lowers corporate disputing expenses (although American business clearly believes it does) or (b) that any savings generated by lowered disputing costs are passed on to consumers. Arbitration has been the norm regarding securities trading disputes since the *McMahon* decision of 1987 and the *Rodriguez* decision of 1989. However, there is no visible reduction in brokerage expenses as a result. See Poser, *supra* note 66. Similarly, BankAmerica's credit cards appear to be charging fees and interest equal to that levied before the *Badie* decision (see *supra* note 68) permitted it to impose customer-wide arbitration.

It may be true that

[t]he idea that a contract has to be completely consensual and knowing is a 19th century concept. There's nothing illicit about it simply because it's non-consensual. Sure there's an imbalance of power, but we enter into adhesionary contracts of law all the time. You sign it without reading it. Commerce would grind to a halt if such contracts were forbidden.

situations continue to be appropriate contexts for the use and enforcement of private ADR. However, a substantial portion of the "new" ADR should probably be brought under the wing of judicial ADR operations or, alternatively, subjected to increasing judicial scrutiny of private new ADR outcomes.²²⁵

Prof. Alan Rau, quoted in Davis, *supra*, at B3 regarding the *Badie* case.

Rau's observation is generally correct, although one can argue that the forum and means of resolving disputes is an aspect of contracting that requires greater solicitude for consent. See Stempel, *A Better Approach to Arbitrability*, *supra* note 33 (arguing that law should enforce adhesive arbitration clauses if they are adequately displayed and explained and are not unconscionable but should refuse to enforce oppressive, hidden, or deceptive arbitration form agreements). But the implicit premise of Rau, Scott, and others defending mass form arbitration contracting is that the contract as a whole provides some significant value and would not be offered in its current form without the arbitration clause. Beyond this, we may want to demand substantial value or compelling circumstances before permitting entities to require arbitration as a prerequisite to entering into even obviously valuable contracts such as employment agreements. See Stempel, *Statutory Vision*, *supra* note 62, at 299-302 (discussing growth of mandatory arbitration clauses in job contracts).

²²⁵ For example, Section 10 of the Federal Arbitration Act provides for only the most deferential review of arbitration awards, providing an arbitration award may be vacated or modified in certain situations:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.
- (d) Where the arbitrators exceeded their power, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the courts may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1994).

Courts have narrowly interpreted this already narrow list of grounds for disturbing an arbitration result. For example, a party "tricked" into signing a bill of lading with an arbitration clause can not challenge an arbitration award on grounds of fraud. The party must present a defense of fraudulent inducement to the arbitrator, who then implicitly rejects the defense if the arbitrator renders an award against the party. The award itself is not "procured by fraud" unless the victorious party bribed the arbitrator or something similar. See Stempel,

B. Updating and Modifying the Sander Model

Although my vision of the multi-door courthouse, like Sander's, leaves disputants with no prerogative to refuse assignment to a "nonadjudication" door, it retains more room for voluntarism and repetition than does Sander's. The Sander courthouse was to have a "screening clerk" who made firm decisions as to which door the incoming dispute must next enter. This construct needs several modifications.

supra note 33, at 1397-1402. See also *Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984) (taking a narrow view of "bias" under Section 10).

Awards that clearly exceed the scope of the matter submitted to arbitration have run afoul of Section 10(d). See, e.g., *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981).

Some decisions also support a "manifest disregard of law" ground for vacating awards in cases where the arbitrator did not merely err in applying law but expressly refused to apply concededly controlling law. See, e.g., *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990); *Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742 (9th Cir. 1985). Even these mildly interventionist cases may exceed the court's power of review under the statute.

When dealing with labor arbitration, the courts are if anything more deferential. See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (labor arbitrator's award will be affirmed if it "draws its essence from the contract," an embarrassingly ambiguous phrase I interpret to mean that the only standard of review is based on the scope of the award). See also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (striking down court interference with labor award on public policy grounds but providing that in some limited circumstances other statutory directives could compel the court to vacate labor arbitration); Lewis Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267 (1980) (despite seemingly narrow directive of *Enterprise Wheel*, reviewing courts frequently do explore the merits of arbitral interpretation); Mark W. Lee, Note, *Judicial Review of Labor Arbitration Awards: Refining the Standard of Review*, 11 WM. MITCHELL L. REV. 993 (1985) (arguing that *Enterprise Wheel* standard should be replaced by Section 10 for labor arbitration awards).

In view of the burgeoning use of new ADR, greater merits-based review of mass-imposed arbitration agreements is in order. This preferably would occur through amendment of Section 10 to expressly expand the court's power of policing these arbitration awards. However, if faced with congressional inaction, a legitimate but expansive re-interpretation of Section 10 could provide for expanded review is permissible "activist" judging. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

1. *The Intake Process*

First, the "screening clerk" should be upgraded to a judicial officer of substantial training and discretion. The state courts that have implemented multi-door programs have already done this to some degree in that the director of the program is a professional with staff that appears to have considerable education and training beyond that normally required of courthouse "digit" clerks who administer the case files.²²⁶ I, however, would ratchet up the personnel component further. The courthouse employees actually presiding over the intake of specific cases and making particular decisions regarding the path of the dispute should be lawyers with training and background substantially similar to that of United States Magistrates. Although it is not essential that these "Intake Magistrates" have a J.D., it seems highly desirable in view of the importance of the intake and direction function of the multi-door courthouse.²²⁷ At the risk of asserting lawyer chauvinism, it seems undeniable to me that, on average, lawyers will do a better job of evaluating legal disputes than non-lawyers.²²⁸ Lawyers will have a better feel for the substantive, procedural, tactical, and professional issues at work in various disputes. As a result, they will understand the dispute processes from the insider's perspective of

²²⁶ See Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988) (describing District of Columbia program and staffing).

²²⁷ Selection of an agenda is often as important as the decision about the agenda itself. See Stearns, *The Forest and the Trees*, *supra* note 212 (discussing Arrow's Theorem regarding agenda control and voting cycling and applying it to constitutional standing doctrine, concluding that restrictive standing doctrine is important means minimizing degree to which doctrine evolves because of order in which cases are presented).

In my view, this explains the generally cold reception Justice Stevens received when he suggested that a national court be established solely to rule on petitions for certiorari. See Curtis J. Sitomer, *U.S. Chief Justice Outlines Ideas to Ease Court's Caseload*, CHRISTIAN SCI. MONITOR, Feb. 7, 1983, at 4; BNA, *Justices Are Split Over Proposal to Revise Court's Jurisdiction*, 43 ANTITRUST & TRADE REG. RPTR. 535, Sept. 23, 1982 (Stevens' proposal publicly criticized by Justice Brennan).

Quick and strong opposition to this notion of a gatekeeper to the Supreme Court reflected the profession's view that such a court might be as powerful as the better understood and scrutinized Supreme Court itself.

²²⁸ See William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 4 (quoting Georges Clemenceau's famous dictum "war is too important to be left to the generals," a saying that should be modified by adding the word "entirely"); see also Stempel, *New Paradigm*, *supra* note 5, at 755.

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having participated in these mechanisms.²²⁹ Similarly, these court officers should ideally have actual experience practicing law or working in an ADR organization or court. However, the resume requirements for this job need not be too rigid.²³⁰

Second, although the "Intake Magistrate" should have the authority to require participation in selected procedures, contestants upon intake should be required to engage in a short discussion of apt alternatives in light of the instant case.²³¹ This could be done by telephone conference with counsel (although some degree of party participation might sharpen the focus and at least explore whether early settlement is an option). The parties would then have a short period of time (e.g., 30 days) for consultation with counsel and to select a preferred ADR option (e.g., mediation, arbitration, evaluation, or a hybrid), including of course the opportunity to exit the judicial system in favor of immediate settlement or private ADR. The Intake Magistrate would not be required to defer to the parties' request or decide between competing proposals, but would be allowed to order a course of action suggested by a party. The Intake Magistrate would be similarly empowered to require the parties to participate in an ADR device of the court's choosing.²³²

After this "open enrollment" period of sorts has passed, the Intake

²²⁹ Surely this is true for litigation, and almost certainly true regarding arbitration and many ADR hybrids. Intake Magistrates and others in the multi-door courthouse may, of course, need specific training regarding ADR methods with which they are less familiar. Mediation, in particular, may be a process not experienced by many lawyers who would otherwise make excellent Intake Magistrates.

²³⁰ For example, a court should be able to hire a recent judicial clerk or perhaps even a recent law graduate as an Intake Magistrate under exceptional circumstances (a really stellar candidate might be worth selecting even absent practice experience), although it might provide too much callow youth for the task and some problems of litigant satisfaction (the contestants may be happier if their case is processed by an older, more experienced person).

²³¹ Although not detailed in Sander's article, this appears to be the prescribed or informal practice of actual multi-door courthouses. See Kessler and Finkelstein, *supra* note 226.

²³² This includes summary jury trial. Although many of the concerns expressed about summary jury trial merit concern and continued study, it and other ADR techniques should be at the court's disposal. This means that courts (including judicial officers of less than Article III rank) should be able to compel litigants to participate in any one ADR device or series of devices if the court thinks it useful. Although courts may err, the risk of ADR error seems no greater in frequency or magnitude than the risks of procedural and substantive error that courts take on in the ordinary course of business. See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

Magistrate would select a party's proffered path or assign the matter as the Intake Magistrate sees fit. This selection would be subject to a limited right of appeal to a judge assigned to preside over this aspect of the court's caseload. The norm would be assignment to an ADR technique offered by the court, or perhaps even a ladder of ADR wings where the case circumstances suggest it or where there are significant social interests in avoiding full dress trial.

For example, under one scenario, a case might be slated for mediation. If mediation does not work, arbitration is next. If this fails to produce an acceptable result or prompt an accord, the parties may be required to participate in a summary jury trial. If the case continues to remain ADR-intractable, the matter would be slated for full scale adjudication (most likely with an opportunity for further discovery than was permitted during any of the ADR phases of the matter). At any point in the proceedings, a party may make any of the currently available nondiscovery pretrial motions (*e.g.*, for judgment as a matter of law, venue transfer, dismissal for lack of jurisdiction), but the court would be free to defer decision on these in favor of permitting ADR.

2. Information Exposure

Thus, a third difference between my suggested courthouse and the Sander approach is the availability of traditional aspects of pretrial litigation, including some early discovery (but discovery that can be limited by the presiding judicial official in the interests of applying an ADR method early in the process prior to the expenditure of great resources by the parties) as well as entertainment of pretrial motions that affect both nondispositive and dispositive issues in the case. For example, the Intake Magistrate may require basic but modest discovery by both sides in order to determine which ADR method to require. The discovery may even aid in prompting the Magistrate to slate the controversy for a more dispositive resolution. For example, the facts may suggest that ADR efforts will be futile, but that the conflict hinges on a narrow matter that can be decided in a one-day trial or by an Article III judge's decision on a substantive legal point.

All of the activity at intake and along the ADR capillaries of this reconstituted judicial corpus would be presided over by judicial officers with education, training, and experience roughly equivalent to that of the Intake Magistrate. There would be some obvious differences, of course. For example, the mediators would have a purer mediation background than the arbitrators, while the Intake Magistrates would possess an educated general knowledge and presumably have greater experience and comprehensive expertise than many of the ADR Magistrates (*e.g.*, Mediation Magistrates,

Evaluation Magistrates, Mini-Trial Magistrates, Discovery and Pretrial Magistrates).

3. Staffing the Multi-door Courthouse

A seemingly intractable concern is the degree to which the judicial officers should be court employees, volunteers, or independent contractors. To date, most courts have used volunteers as their judicial adjuncts for ADR.²³³ Although this approach certainly is defensible,²³⁴ I would prefer that ADR Magistrates be full-time judicial personnel subject to the selection, training, control and evaluation of the court. Also, they should receive sufficient compensation and benefits so as to attract society's most able lawyers for the task. Use of volunteers or independent contractors presents the opportunity to obtain ADR presiders who would not be willing to become full-time government employees. The AAA has used this approach for years, and often has arbitrators who are corporate CEOs and name partners in prestigious law firms to preside over claims. But, in many instances, reliance on volunteers brings forth a calvacade of professionals who simply are not very busy, perhaps for a reason. In addition, the range of quality and control over volunteers is too large for comfort.²³⁵ Because

²³³ See Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994) (early neutral evaluators in Northern District of California are volunteers); Kessler and Finkelstein, *supra* note 226, at 581-82 (mediators and settlement moderators in D.C. Superior Court are volunteers); CJRA Delay and Expense Reduction Plan for the Eastern District of New York (Edwin J. Wesley, Rptr) (Dec. 1993) (evaluators and mediators used for ADR are volunteers). The general practice for court-annexed arbitration has been to provide modest payment to the arbitrators. The pay is thought useful for prompting arbitrators to take their responsibilities seriously but the participation is also considered a pro bono activity of sorts. See BARBARA MEIERHOFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990); Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983).

For an example of judicial opposition to court-annexed arbitration and other court-connected ADR, see G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 (1993).

²³⁴ It appears to have worked well in Florida, which has mandatory mediation and utilizes certified volunteer mediators. See Sharon Press, *Building And Maintaining A Statewide Mediation Program: A View From the Field*, 81 KY. L.J. 1029 (1993); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This The End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 48-59 (1991) (describing Florida program).

²³⁵ It is large with respect to full-time employees as well. But an employer generally has more opportunity and incentive for training, supervising, and evaluating employees than it

the competence of individual ADR officers is so important to the success of any ADR mechanism²³⁶ (just as the quality of the judge is crucial to the quality of adjudicative outcomes), a serious attempt to provide court-connected ADR requires a commitment to staffing it with employees and providing the requisite fiscal support. Some ADR advocates have been hesitant on this point largely because ADR has been "sold" (or "oversold")²³⁷ as a means of reducing court costs. A good deal of evidence suggests that ADR may not reduce total disputing costs.²³⁸ Providing high-quality, court-connected ADR is unlikely to reduce the costs of judicial administration, even if volunteers are utilized. Indeed, using volunteers or contractors may be only slightly less expensive than using court-employed ADR Magistrates. Use of volunteers requires substantial written materials, training courses, and supervision by a staff of professionals.²³⁹ When all the costs are finally and thoroughly counted, the gap between a volunteer program and one of full-time, professional judicial officers may be sufficiently narrow to remove cost considerations as a basis for selecting a less desirable staffing method.

4. *Quality Control*

A fourth distinction between the Sander approach and my proposal is what I loosely term "appellate review." The contestants should have an opportunity to challenge the ADR directions of the Intake Magistrate. Something akin to the final order rule²⁴⁰ and its rare but important exceptions²⁴¹ should govern administration of a challenge. However, the

does for volunteers.

²³⁶ See Rosenberg & Folberg, *supra* note 233.

²³⁷ Chief Judge Thomas Griesa (S.D.N.Y.) speaking to a meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York (June, 1992).

²³⁸ See State Justice Institute, *supra* note 6 (reviewing studies).

²³⁹ See Kessler & Finkelstein, *supra* note 226, at 586-87 (describing orientation and oversight of ADR volunteers).

²⁴⁰ The final order rule provides that aggrieved litigants may ordinarily appeal a ruling only after final judgment of the controversy. See 28 U.S.C.A. § 1291 (1994 & Supp. 1995); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976).

²⁴¹ By statute, district courts may certify doubtful and controlling questions for appeal. See 28 U.S.C. § 1292(b) (1994 & Supp. 1995). In addition, courts may designate a sufficiently concrete and settled aspect of a case final for purposes of review. See Fed. R. Civ. P. 54(b).

Orders that conclusively determine the rights of a litigant (as well as nonparties) separate from the merits of the case are reviewable pursuant to the collateral order doctrine. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1977); *Cohen v. Beneficial Industrial Loan*

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quasi-injunctive nature of mandatory participation in court-connected ADR²⁴² suggests that review should be accorded somewhat more liberally than review on the merits. In Federal court, contestants who disagree with the initial or subsequent case processing orders of the court (as rendered by Intake Magistrates, Mediators, Evaluators, Arbitrators, or others) should be permitted to file objections with either a "full scale" Article I Magistrate (if the generalist magistrate position continues to exist in the multi-door courthouse of the future) or an Article III trial judge.

The nature of review would fall somewhere between the extraordinary events of mandamus and ordinary appeals (where reversals occur approximately 40 percent of the time).²⁴³ The reviewing judge would examine challenges to ADR directives looking (but not painstakingly searching) for a clear abuse of discretion or the imposition of serious inconvenience or expense that is not likely to move the dispute toward resolution. All ADR activities would be nonbinding, at least unless a constitutional amendment were to change current rights of due process and jury trial. Consequently, each litigant retains the right to move toward full scale trial of a dispute so long as it does not forfeit that right by refusing to follow court orders regarding ADR (and, for that matter, discovery or other pretrial orders).

5. Utilizing the Fruits of ADR in Adjudication

The ultimate availability of trial not only insulates ADR from constitutional infirmity,²⁴⁴ but also permits judges to give ADR processing decisions reduced scrutiny as compared to the degree of review required of substantive rulings, dispositive orders, and judgments.²⁴⁵ Parties unhappy

Corp., 337 U.S. 541 (1949). Erroneous orders that exceed the court's jurisdiction may be challenged by mandamus. See 28 U.S.C. § 1651 (1994 & Supp. 1995); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

²⁴² Injunctive orders are considered sufficiently final as to be immediately appealable because they are difficult to review and correct after final judgment on the entire case since they require or constrain the parties' conduct during the pendency of the case. See 28 U.S.C. § 1291 (1994 & Supp. 1995).

²⁴³ See Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & SOC'Y REV. 403 (1987).

²⁴⁴ See, e.g., *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E. D. Pa. 1979); *Davis v. Gaona*, 396 S.E.2d 218 (Ga. 1990); *Firelock, Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989).

²⁴⁵ Yes, I know that procedural events effect substantive outcomes. I am a civil procedure teacher, after all. But, although the line is blurry and elastic, there is a basic distinction between procedure and substance. Generally speaking, substance is more

with the ADR outcome can obtain trial *de novo* — complete retrial of the matter—as though the ADR (usually court-annexed arbitration) had never occurred. As much as we need continued adjudicatory capacity and the backstop of adjudication to make ADR work, we do not need to be quite so skittish about permitting the fruits of ADR to be used in subsequent adjudication. In particular, I propose that, in any subsequent adjudicative proceedings, litigants be permitted to present evidence regarding the ADR events and results. Although there is, of course, the potential for prejudice, judges and juries should know what occurred in the arbitration or mediation that preceded the trial.

This suggestion will undoubtedly horrify more than a few in the legal profession. But it is worth taking. First, although it would not help a defendant that the jury knew that an arbitration panel thought the defendant owed the plaintiff a million dollars, this fact would not be unfairly prejudicial. The finding would be the result of a court-connected, public process²⁴⁶ presided over by a court officer and subject to court supervision. If this process is so inherently unfair that it produces outcomes which must be shielded from jurors, it is sufficiently unfair that it should be scrapped altogether.

A less controversial aspect of my suggestion involves maintaining a full record of decision-directed ADR proceedings and permitting litigants to utilize that record at trial. The most obvious application would be use of a testimonial transcript from an arbitration hearing or summary jury trial to impeach a witness at the “real” trial. This would encourage counsel and

important. I am all for due process, but given the choice between wonderful process and horrible substance or poor process and wonderful substance, I take the latter. For example, a fair hearing is of relatively little use if you can be forced to undergo the hearing because you criticized the President, drank a beer, painted your house a certain color, bought stock in a start-up company, rented a car, or decided to become a lawyer. If these and similar rights are protected by even pretty slipshod process, most of us are satisfied. At some point, of course, a procedural system can be so bad that procedure is substance, negating even good substantive law (or the ostensibly good substantive law on the books; consider the constitutions of totalitarian countries, which never in practice provide the freedoms outlined in the document). Most of us would not want an adjudicator who routinely conferred *ex parte* with government prosecutors to decide free expression cases or who flipped a coin in contract disputes. ADR critics have raised many issues worth reflection, but no one has made the case that any standard form of ADR is sufficiently deficient that it routinely undermines substantive law—so long as the adjudication option remains and is not made prohibited through imposition of costly or exhausting ADR participation that exceeds the stakes of the dispute.

²⁴⁶ Court-connected ADR events other than the conferences and mediation should generally be public absent stipulation of the parties approved by the court (by a Magistrate, Article III judge, or court order).

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contestants to avoid chameleon-like litigation tactics²⁴⁷ or using ADR simply as a means of testing and polishing its presentation for litigation.²⁴⁸

The precise contours of record-keeping and disclosure to the adjudicator are difficult to draw in the abstract. For example, should records be kept of some mediation discussions so that representations by the parties are available for use at trial? Should mediation offers and rejections be admissible? Although the conventional wisdom is that settlement discussions are confidential,²⁴⁹ a different rule should perhaps obtain for at least the more formal aspects of mediation (mediator discussions with individual contestants would remain confidential). Although mediation implies an effort at settlement, it is a more public, formal, and substantive event than private settlement negotiations. To the extent that the mediator must act in order to compensate for power imbalances and other problems (an issue discussed at greater length below), mediation becomes quasi-adjudicatory. Just as transcripts are kept of a judge's conference at sidebar, mediation meetings should probably be recorded and available for subsequent use if the mediation does not produce a final result.

In addition, the contestants' rejections of settlement and perhaps their concessions regarding settlement should, perhaps, be admissible in subsequent proceedings (including arbitration as well as trial). This is, of course, counter to the conventional wisdom, which posits that a contestant's settlement position is not the business of the jury and, perhaps, not of the judge. Although the evolution of the judiciary from deciding cases toward attempting to force settlement of them has rightly been criticized, that evolution entails a different issue (the apt role of judges) than does the matter of allowing the court to have and use settlement-related information. Admitting settlement information raises the issue of whether the information is sufficiently relevant so that it will permit better adjudicative decisions and encourage fair resolution of the matter. Despite the confidentiality traditionally accorded settlement matters, it increasingly seems that a decisionmaker gains valuable knowledge by knowing what a party

²⁴⁷ See *Harbor Ins. Co. v. Continental Bank, Corp.*, 922 F.2d 357, 362-63, (7th Cir. 1990) (discussing "mend the hold" doctrine which, under certain circumstances, prevents a party from changing its litigation position regarding contested matters).

²⁴⁸ See *supra* notes 154-163 and accompanying text (discussing opportunities for contestants and counsel to use ADR to learn to present a better, but false, face to adjudicators). There is, of course, nothing wrong with a lawyer who tries to learn from the arbitration hearing in order to better represent the client at trial. But where the attempt to "go to school" from ADR is solely tactical and not bounded by fidelity to the actual facts of the case, a lawyer uses ADR unscrupulously.

²⁴⁹ See, e.g., Fed. R. Evid. 608 (providing that statements made in settlement discussions are inadmissible).

demand in settlement or rejected as a proposed resolution. This information may indicate the party's own valuation of the claim, its reasonableness, or appropriate remedies. Although there are obvious dangers of bias or misinterpretation, this exists for any data subject to the adjudication process.²⁵⁰ Perhaps the value of the ADR-generated information will outweigh the danger of misinterpretation. It at least seems worth a try.

Like Sander, I accept the notion that the Seventh Amendment and its state counterparts limit the power of the judiciary (or legislature or executive) to substitute ADR for adjudication against the will of a contestant. Unlike Sander, however, I do not see this as either cause for dismay or a major impediment to an effective multi-door courthouse. Despite being a defender of the jury system, I see some desirability in at least experimenting with different means of conducting jury trials and presenting cases. Despite the occasional horror stories of jury error, it would be a mistake to scapegoat the jury for failure to improve or streamline judicial dispute resolution. Judges and ADR officers (public and private) also make mistakes. In reality, jury trials are not as cumbersome, slow, or expensive as commonly believed. More important, an effective sequence of ADR events will likely restrict the demand for jury trials to the cases in which they are most useful, as well as focus the case on matters in which jury input is most valuable.

The multi-door courthouse I envision is one in which things move quickly while still allowing for effective information gathering and sufficient opportunity for counsel to prepare a case for optimal presentation. Too much speed in the process may not allow the parties the opportunity to have meaningful settlement talks. However, settlement-directed ADR, such as the initial conference and mediation, should generally take place earlier rather than later. Many mediation programs for small cases arrange this for the day of trial. However, it may be worthwhile for many cases (large and small) to hold serious conference or a brief mediation early in the litigation.²⁵¹ Preparing even small cases for trial results in the expenditure

²⁵⁰ One of my favorite stories in this regard is one told by Judge Rya Zobel (D. Mass.), the current Director of the Federal Judicial Center, when she was presiding over a trial competition that I attended while in law school (in New Haven, March 1981). Judge Zobel recalled how her father once successfully objected to keep a government report out of evidence in a case of alleged arson. Shocked by the subsequent result of conviction, he inquired of the jurors, who stated that they believed the excluded document was a confession. So much for the value of firewalls between juries and prejudicial evidence. Although a motion in limine may have cured this particular problem, juries faced with information gaps may make similarly erroneous assumptions.

²⁵¹ See *supra* notes 180-87 and accompanying text (suggesting that specific disputing

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of resources. Cumulatively, this probably amounts to a large enough sum to justify earlier but abbreviated settlement efforts for even small cases.

Multi-door courthouse intake and ADR proceedings should be largely informal as the parties and counsel deal with assignment officers, mediators, arbitrators, or other ADR personnel. To protect against the dangers of informality, conferences and calls may need to be transcribed in some manner so as to create a record for review. The intake and subsequent ADR that I propose would take place rapidly. The system would be designed to deliver more quickly to the disputants a satisfactory opportunity to be heard on their claims. This would include frequent resort to decision-directed ADR and a conscious attempt not to expend excessive resources on settlement-directed ADR. For example, mediators would move with finesse, but would not spin metaphorical wheels on a case in which no compromise is available. Arbitrators and other ADR officers would move quickly with streamlined discovery, procedure, and documentation (since any mistakes would largely be subject to judicial correction).

6. Authority and Discretion in ADR

Two aspects of this proposed dispute resolution workshop bear emphasis. First, the Intake Magistrate would have authority to order good faith participation in ADR (directed to either settlement or decision) subject to the review described above. Second, the court officers presiding over ADR would not be fixed in their primary roles. Mediators would be permitted to exercise discretion and judgment in determining when they must act to control an abusive or unfocused contestant and when to segue from listening to the contestants and seeking voluntary resolution to delivering either a formal or informal early neutral evaluation. Similarly, arbitrators could decide a key point and then give the parties the remainder of the day to discuss settlement in light of the ruling, or could provide the parties with the rationale for the decision. This would possibly aid their determination of whether to seek trial *de novo*. The history of ADR, particularly private arbitration, has been to say as little as possible in order to insulate outcomes from reversal and to prevent public knowledge of private squabbles. This ethos is probably misplaced, or at least overdone, in the context of court-connected ADR in which ADR events have the potential to be part of a decisionmaking stream involving a continuum of settlement opportunities and decisions, as well as ultimate adjudication and appeal.

Expanded use of court-connected ADR presents a classic problem of agency costs. To the extent that the ADR Magistrates or other court officers

events provide catalysts for settlement).

are closely scripted and confined to more narrow roles (*e.g.*, mediators that just listen and work toward voluntary settlement with minimal editorializing rather than make pronouncements or decisions), the chances of error and the possibility of imposing "involuntary," court-opposed results are reduced.

To the extent that ADR officers have more discretion, they have more opportunity to resolve matters creatively and expeditiously (*e.g.*, the mediator asks the parties to stipulate to be bound by her assessment, they agree, and she renders a binding decision).²⁵² Discretion poses danger but also more opportunity for gain. Because the skill of the person presiding over ADR is a key factor in the success of and contestant satisfaction with ADR,²⁵³ more discretion should be accorded to the public ADR officer. If the ADR officer is incompetent, the results will be dreadful (even if his role is circumscribed). If he is good, discretion will only make ADR outcomes better on the whole. If discretion is abused, judicial review remains.

If properly structured and staffed, the posited multi-door courthouse would channel disputes based upon individual case characteristics. However, the broad patterns of case routing would probably parallel the conventional wisdom regarding the categories of disputes most apt for different ADR methods. Where the parties have a genuine interest in maintaining a relationship, some attempt at a less adversarial and finite resolution is in order (*e.g.*, an early settlement conference, mediation, or evaluation). Where the substantive legal outcome is unclear and has significant zero-sum traits, flexible ADR efforts of this type should also probably be attempted. Where the dispute is between strangers or enemies and hinges on a clear determination of fact or law, the ADR effort should be aimed at a principled decision, such as arbitration, that will likely be sufficiently acceptable to obviate the need for trial or streamline the actual trial. Where the parties simply lack sufficient perspective on the merits, early neutral evaluation may be the answer. Where the controversy is complex or the stakes large, a summary jury trial may be worth its investment in time and effort (to avoid a multi-month trial or to convince the contestants that full-dress trial is not worth the extra effort in view of the odds). Where matters are more complex, implicate important values, or hold potential precedential importance, the multi-door courthouse should invest in ADR only if it brings a quick, negotiated resolution. In such a situation, it should aim directly for adjudicative resolution without

²⁵² Of course, this should be subject to review should one of the contestants feel it was coerced into the arrangement or defrauded by the arrangement.

²⁵³ See Rosenberg & Folberg, *supra* note 233, at 1530-35 (noting that satisfaction of participants in Northern District of California ENE program was most correlated to the skill of the Evaluator even though there was wide variation in the manner in which evaluators discharged their duties).

intermediate efforts at decision-making ADR such as arbitration.

C. Issues of Power and Coercion in Litigation

Questions of role, intervention, activism, and evaluation are perhaps most pointed in the controversy surrounding the utility and apt deployment of mediation in domestic relations matters. Originally, mediation of divorce, support, property division, and child custody matters was first greeted as a welcome change from the bitterness often attending traditional litigation of these matters.²⁵⁴ In the past decade, however, many have challenged mediation in this context as stacking the deck against women, or at least reducing the procedural protections that they receive in traditional litigation.²⁵⁵ The feminist criticism of mediation parallels the poverty lawyers' criticism of small claims court:²⁵⁶ a less formal proceeding designed to result in settlement rather than a rational public judgment of the facts and law inherently advantages the contestants with more financial resources and bargaining power (usually the husbands). Where there has been physical abuse or other mistreatment of the wife, the problem is exacerbated.

These are most serious concerns and require any court-connected ADR system to respond. Although some of the concern may be overstated and based on anecdote, courts have responded in apt ways. For example, the District of Columbia multi-door courthouse does not route domestic cases to mediation if there has been violence or abuse.²⁵⁷ In addition, the well-trained court employee mediators I propose will presumably be very competent. This competence, training, continued supervision, and evaluation increases the odds that mediators will recognize the power

²⁵⁴ For example, the notions of no-fault divorce and equitable distribution were initially thought to lower the level of acrimony attendant to the dissolution of marriage, and to better reflect contemporary attitudes about gender equality and roles. Subsequent research has suggested that both measures may have harmed women. See, e.g., Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991).

²⁵⁵ See, e.g., MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (arguing that mediation has bias in favor of shared custody that disadvantages women); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (contending that mediation exerts power subtly over women with inadequate procedural protection and opportunity for exit or review); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

²⁵⁶ See Lazerson, *supra* note 210.

²⁵⁷ See Kessler & Finkelstein, *supra* note 226, at 581.

imbalances of a relationship that may potentially prompt unjust agreements. The discretion vested in these mediators should enable them to act forcefully to prevent such agreements, and to render evaluations and prospective rulings as needed to procure a fairer outcome. If the husband does not like it, he has the option of arbitration or full scale adjudication. As a practical matter, this may be cold comfort to the wife trying to litigate on a limited budget under a distasteful interim regime of inadequate support or mangled child custody. However, the wife is not any worse off than would be the case if there were no court-connected ADR (at least so long as ADR efforts do not significantly slow the process, increase costs, or provide additional opportunities for strategic behavior to the husband). Consequently, in this context (and others), the multi-door courthouse must not permit ADR to comprise another layer of process that simply adds to the mix without providing the third party perspective and catalytic events necessary to produce resolution or clarification of issues.

For that reason as well, lawyers remain critically important and I would urge that they be a part of all court-connected ADR activities, even mediation (subject, of course, to the parties' own informed decisions about forgoing a lawyer). Although disparate resources usually means disparate access to legal services, less powerful contestants will generally always be better off with at least some legal assistance than they would be without it. Although lawyers on more than a few occasions throw sand in the gears of a process, they usually recognize the value of settlement and urge their clients to be receptive to it in appropriate circumstances. Simply because a relatively small percentage of lawyers lack good judgment, have inappropriate "Rambo" temperaments, or are desperate to generate fees, should not create a conventional wisdom that ADR will function better if lawyers have a reduced role. On the contrary, a skillful domestic relations mediation with husband and wife well-represented by counsel strikes me as the best defense against the feminist critique of mediation (and may provide the comparative advantage over traditional litigation that originally animated this portion of the modern ADR movement). My intuition has long been that lawyers have an important role to play in minimizing abuses of mediation (or any other form of ADR). Consequently, I was fortified (and perhaps relieved as well) to see that experts much more conversant in the actual operations of ADR and mediation have taken this view. In a recent article, Craig McEwen, Nancy Rogers, and Richard Maiman comprehensively make this point by applying both theoretical and empirical analysis.²⁵⁸ Even a modicum of competent legal representation will go a long way in discouraging the dangers that some see in mediation,

²⁵⁸ See Craig A. McEwen, et al., *Bring in the Lawyers: Challenging the Dominant Approach to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

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particularly for women. However, because lawyers vary in quality, the state should provide mediators of skill vested with the discretion to actively intervene in order to prevent abuses and to segue from mediation to other ADR forms or directly to litigation. Although the debate will undoubtedly rage about whether this constitutes "real mediation"²⁵⁹ or justifies mandatory programs,²⁶⁰ it seems inevitable that mediation officers must be willing to depart from passive neutrality when warranted (just as a judge does), and that mediation, like any form of disputing, probably works better when lawyers (the world's leading dispute resolution specialists) are part of the process.

D. Opting For Quality Rather Than Cost Containment

The modern multi-door courthouse I paint as a judicial Nirvana²⁶¹ assumes a commitment of resources that may be highly unrealistic.²⁶² For example, many well-qualified and well-trained non-Article III court officers are necessary to serve as ADR officers if the proposed system is to work well and with sufficient efficiency. The suggested system also requires that matters move forward with some dispatch. Delayed or cumbersome public ADR would provide too much opportunity for strategic behavior such as stalling or wars of attrition by contestants with the larger war chest (*e.g.*, the large company locked in combat with an irate customer) or a more favorable litigation position (*e.g.*, the current occupant of disputed property). In addition, the modern multi-door courthouse must possess modern technology to facilitate conference calls, videoconferencing, audio and video recordings of proceedings, and other methods that would improve process protections without the inordinate costs that often plague full dress pretrial and trial proceedings.

Unfortunately, legislators and the public appear unwilling to make this

²⁵⁹ *Id.* at 258, at 1392-94.

²⁶⁰ Mediation should be mandatory if ordered by the Intake Magistrate, just as arbitration, neutral evaluation, summary jury trial, or a settlement conference should be mandatory if ordered by the court via rule or individual assessment of the case.

²⁶¹ Although perhaps I am too late in offering this vision. See Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635 (1989) (criticizing Judge Weinstein's characterization (*What Discovery Abuse?*, 69 B.U. L. REV. 649 (1989)) that modern litigation is not so troubled as the critics suggest: "Nirvana has been located and it is in Brooklyn").

²⁶² Although modern adjudication has its problems, Judge Weinstein's characterization then and now is closer to the mark. Judge Easterbrook would solve docket problems by limiting the rights accorded under the substantive law. See Easterbrook, *supra* note 261, at 643-45. That may be effective in easing court backlog and procedural costs, but it is a bit like substituting a dictatorship for democracy in order to ease government gridlock.

commitment of personnel, technology, and money to the courts. Although penny-pinching the judiciary is nearly always shortsighted, it is particularly counterproductive if the goal is effective reform of the traditional adjudication model and court infrastructure. Unfortunately, however, penny-pinching the judicial system (like bashing it) tends to be good electoral politics, which poses more than the usual set of dangers in this context. Insufficiently supported ADR and multi-door courthouse initiatives would likely confirm the fears of ADR critics. Either their brave new world of inferior justice will have arrived, particularly for individuals and poorer litigants, or public backlash against this development will ultimately defeat reform. Effective judicial use of ADR requires a modern multi-door courthouse and sophisticated, well-trained judicial officers.

Fortunately, a ready pool of such personnel does exist. There are nearly one million American lawyers, many of whom (especially recent law school graduates) are underemployed, who could fill the multi-door courthouse. Rather than continue to waste or misdeploy these resources, as lawyers leave the profession or overcongregate in some areas, perhaps society should attempt to harness this expertise. A natural role for many of the nation's lawyers disenchanted with practice is as ADR officers or staff. Tapping this resource again raises the funding issue.

Good lawyers generally will not work for peanuts no matter how satisfying the task (although the career decisions of many legal aid and public interest lawyers continues to refute this assessment). If the pay and job conditions are too discouraging, they will continue to slug it out in private practice, business, or government agencies. They may even hang a shingle and advertise in the yellow pages. But many want to be a part of something other than client-centered adversarialism and aspire to lawyering with a greater public purpose.²⁶³ They are the natural applicants for the ADR court officer positions posited for the modern multi-door courthouse.

An ADR-enhanced multi-door courthouse could continue to satisfy the concerns of those who resist substantial increases in the size of the judiciary, particularly the Article III federal judiciary, while at the same time vastly increasing the dispute resolution and adjudication capacities of the courts. The judicial personnel used for administration of court-sponsored ADR initiatives such as intake, mediation, evaluation, arbitration, settlement counseling,²⁶⁴ and hybrid ADR will relieve the

²⁶³ The relative ease with which courts have obtained volunteer arbitrators, mediators, and settlers provides some evidence of this. See Fosenberg and Folberg, *supra* note 233, at 1489-90; Kessler & Finkelstein, *supra* note 226, at 586-89; Broderick, *supra* note 233.

²⁶⁴ I stress that most of the judiciary's future ADR efforts should be directed toward providing the contestants with a forum, a reaction to their claims, and a presumptive decision rather than attempting to hammer out a settlement. If the judicial system, including both ADR

judicial workload in qualitative terms even if not in quantitative terms.²⁶⁵

The rough organization of these judicial officers has been previously sketched. Although, as noted above, it would be most useful if mediators and arbitrators had some experience in practice, the ADR judicial officer system I posit could evolve and operate like the continental European model in which prospective judges train for the position and view it as a career choice rather than as the capstone of an otherwise distinguished career and a political appointment process (the model which dominates for Article III judges and increasingly for Article I Magistrates Judges who aspire to be Article III judges). Although the European model is not a perfect analogy, and American courts would surely want to resist an overbureaucratic judiciary (even in its "nonadjudicatory" branches), it provides a reference point worth considering at a time when traditional adjudicatory resources are hard pressed, and powerful political and social forces resist expansion of the Article III judiciary. Furthermore, some of the traits most sought in an Article III judge—legal intellect, firm independence, and skill in crafting precedent—are simply not likely to be as valuable or necessary for one who presides over mediation, early neutral evaluation, or nonbinding arbitration.

In short (and at the risk of sounding elitist), a front line of judicial officers administering court-controlled ADR need not be Holmes, Brandeis

and traditional adjudication, functions effectively, contestants will reach appropriate settlements as a matter of course without judicial settlement brokering.

²⁶⁵ See Robel, *Private Justice*, *supra* note 169 (judges seek to work on the most interesting, important, and precedential litigation matters and are, therefore, receptive to privatization that provides them more time to do so; Robel defines privatization more widely than either Weinstein or me in that she regards court-connected ADR as a type of privatization since it tends to remove disputes from traditional Article III adjudication).

As Prof. Thomas Rowe noted in his presentation at the Conference, expanded court-connected ADR will not necessarily reduce the total volume of claims because of the "superhighway" effect, or what I have previously called the "Robert Moses problem" (after New York Public Works czar Robert Moses, who was responsible for the Triboro Bridge, other improvements, and major roads in the region, including the infamous Long Island Expressway): a larger, faster road is built to relieve traffic, but causes traffic to increase because more people want to drive on the larger, faster road. Consequently, an improved court system may not show gains (particularly immediate gains because there may be pent-up demand) in speed or reduced volume of cases. See Thomas Rowe, Videotape Remarks at Panel Discussion (Mar. 31, 1995) (on file with author); Panel Discussion, *Civil Litigation in the Twenty-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1224 (1993) (including Margaret A. Berger, Judith Resnik, Kenneth R. Feinberg, Ralph K. Winter, Deborah R. Hensler, Stephen Subrin, and Elizabeth M. Schneider (arguing that even a bad new road may bring increased traffic and that deficient procedure will cause additional expense without efficiency)).

or Cardozo. In fact, the ideal mediator might be quite different in talent or temperament than the "Yankee from Olympus,"²⁶⁶ the studious Brandeis,²⁶⁷ or the sociologist observer Cardozo.²⁶⁸ Undoubtedly, some will interpret the foregoing statements as elitist overgeneralization suggesting that contestants, claims, and lawyers should be, to use Orwell's famous phrase, "less equal than others."²⁶⁹ On the contrary (for the most part), I think that many of the matters likely to be addressed and resolved by judicially-controlled ADR will be among the most important social functions of government. It is vital that claims for which traditional litigation is economically unwise be treated seriously by the judicial system rather than be queued behind judicial activity directed toward discovery disputes in multimillion dollar commercial litigation. I do not intend to demean some disputes as unworthy of full adjudication or beneath the dignity of federal courts. However, I do suggest that liberals and moderates face the inevitable problems of resource scarcity and popular sentiment. In my lifetime (and I am not *that* old), we will not see federal or state governments willing to add scores of Article III judges (or state court analogs) as a matter of course.²⁷⁰

²⁶⁶ See CATHERINE P. BOUREN, *YANKEE FROM OLYMPUS: THE LIFE OF OLIVER WENDELL HOLMES* (1944). See also RICHARD A. POSNER, *THE ESSENTIAL HOLMES* (1994) (collection of Holmes' work with Posner commentary); SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989); MARK DEWOLFE HOWE, *OLIVER WENDELL HOLMES: THE PROVING YEARS* (1963) (all generally praising Holmes' intellect but acknowledging criticisms that Holmes was patrician, judgmental, occasionally curt in human relations, willing to let social chips fall where they may, and less interested in small disputes).

²⁶⁷ See Robert Cover, *Your Law-Baseball Quiz*, N. Y. TIMES, April 5, 1979, at A23, col. 3 (comparing Brandeis to baseball great Lou Gehrig in productivity, noting that baseball will probably never see another player participate in more than 3,000 consecutive games as did Gehrig, and the Supreme Court will probably never again see a Justice for whom multi-volume reports of the Interstate Commerce Commission would constitute "recreational reading"). It was, of course, Brandeis who made the famous statement differentiating the Court from other parts of government because "we do our own work." Brandeis even had the intellectual and emotional energy for political intrigue. See BRUCE ALAN MURPHY, *THE BRANDEIS-FRANKFURTER CONNECTION* (1982) (discussing nonjudicial activity of Brandeis). But see Robert Cover, *The Framing of Justice Brandeis*, NEW REPUBLIC, MAY 5, 1982, at 17 (criticizing assertion that Brandeis acted improperly).

²⁶⁸ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990).

²⁶⁹ See GEORGE ORWELL, *ANIMAL FARM* 123 (1946).

²⁷⁰ Pending federal legislation proposes a seven-year salary freeze for federal judges as well as abolition of the Legal Services Corporation and other civil justice reforms (aptly described by Judge Weinstein as a "meataxe when a scalpel is required;" Weinstein, *supra*

E. Lingering Distributive and Value Questions

With or without court-connected ADR, justice will inevitably be rationed according to wealth (who can buy traditional adjudication), patience (who can wait for traditional adjudication), or personality (who is willing to cling tenaciously to the goal of traditional adjudication for his or her case). In this context, bringing a good deal of ADR, particularly new ADR, under the judicial wing will likely improve the quality of "justice" for the mythical, "average" litigant.²⁷¹ If I am wrong, however, a contestant who finds no satisfaction in the ADR rooms of the multi-door courthouse retains the right to pursue traditional adjudication. Some greater degree of decision-oriented ADR in the courts increasingly appears the most feasible means of saving the courts by permitting them to hold fast to core functions.²⁷²

A widely accepted proposition holds that brisk dispute processing prompts increased and more rapid resolution of claims. The looming of an adjudicatory or a quasi-adjudicative event (to borrow Samuel Johnson's phrase) sharpens one's concentration.²⁷³ Unfortunately, the procedural reform efforts of the past 15 years have failed to improve decision-making on substantive claims, but have instead added additional opportunities for delay, strategic behavior, and the avoidance of determinations. ADR that enables the judicial system to more easily make these determinations will assist the judicial system, and vindicate the values promoted by adjudication's defenders. Surely, to commentators like Resnik or Fiss, this is less satisfactory than the actual expansion of adjudication, but it should be considerably more palatable to this cohort of the profession than a

note 1). See *How the Proposed Federal Legislation Could Affect Your Court*, JAD LINK, Vol. 2, No. 1 (Aug. 1995).

²⁷¹ Unfortunately, the possibility of better empirical data about courts seems more remote than ever, as current politics pushes for reduction in government spending and evidences a certain disdain for the mission of research. For example, the House Appropriations Subcommittee has recommended no funding for the State Justice Institute of the National Center for the Study of State Courts. The Institute, which among other things recently produced an excellent Symposium and proceedings about ADR (see *supra* note 6), received more than \$13 million in fiscal 1995. Even the born-again budget-cutter President Bill Clinton had proposed \$7.6 million for the Institute for fiscal 1996. See *How the Proposed Federal Legislation Could Affect Your Court*, *supra* note 270, at 1, 7.

²⁷² See Robel, *Private Justice*, *supra* note 169.

²⁷³ See Samuel Johnson, quoted in Patrick A. Parenteau, *Everything You Wanted to Know About Environmental Law, You Learned in Kindergarten*, 23 ENVTL. L. 223 (1993) ("prospect of a hanging can concentrate the mind wonderfully").

continuing drift toward settlement-directed procedures framed by an increasingly limited availability of civil adjudication. More judicially-controlled ADR can, in fact, open doors that must have appeared closed during the past 20 years.²⁷⁴

One positive attribute of ADR is its flexibility and less-structured communication dynamic. Mediators, evaluators, and arbitrators can talk and interact with contestants in ways normally thought inappropriate for a judge. Procedures and determinations need not hew so tightly to prescribed formats. Although this, of course, holds some potential for mischief, it holds similar potential for greater fairness and contextually "correct" determinations of disputes.²⁷⁵

If it embraces the mantle of ADR's flexibility and responsiveness (rather than its potential for merely truncated procedure and insufficiently reflective decisionmaking), the multi-door courthouse would be: informational and educational rather than dictatorial; respectful of process values, but informal and streamlined; conversational with contestants, but vested with power to enforce and police the paths of ADR chosen or

²⁷⁴ As outlined, my proposed modern, multi-door courthouse looks suspiciously like the two-tier trial system for civil cases suggested by Albert Alschuler or the streamlined small claims court recently proposed by former Federal Judicial Center Director Judge William Schwarzer. *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

The resemblance is only a bit beyond skin deep. Unlike Judge Schwarzer, I favor offering the same range of ADR and adjudicative services for all cases within the court's jurisdiction. The gatekeeping, or rationing of the multi-door courthouse, is to be applied by judicial officers acting in the context of a specific case rather than tracking a case solely by dollar amount, subject matter, or parties (although the Intake Magistrates will undoubtedly apply presumptive rules of thumb in making their routing of the cases).

My vision of the multi-door court does parallel Alschuler's two-track system, particularly when a case is arbitrated in lieu of or as prerequisite to litigation. But, although I advocate more decision-making and less pretrial maneuvering and settlement brokering, I emphasize the ADR ideals of flexibility and voluntary (if court-spurred) resolution of controversies more than does Alschuler.

²⁷⁵ This flexibility could even extend to the degree in which court clerks and Intake Magistrates are helpful to contestants (for example, the way in which AAA tribunal administrators and staff typically explain things to arbitration contestants and assist them in moving forward). Although one should be careful in damning court clerks (some are more helpful than lawyers deserve), my own experience in practice often confirmed Max Weber's worst fears about the tyranny and inflexibility of the petty bureaucrat. See MAX WEBER, *CRITICAL STUDIES IN ORGANIZATION AND BUREAUCRACY* (Frank Fischer and Carmen Siriann, eds.) (1994). Infusing some ADR into the more formal judiciary may infuse the system with some of the "client service" aspects of private ADR.

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applied; and interested in litigant satisfaction, acceptable substantive outcomes, final and reliable case disposition, and cost savings.

Although this sort of ADR-enhanced courthouse may not meet the ideals of those most committed to adjudication, it does avoid the problems of excessive reliance on settlement efforts and possible coercive, judicial intervention as a response to caseload pressures. To illustrate the limits of making settlement too much the icon of even an ADR-oriented courthouse, consider the now-classic discussion of settlement in the now-classic work on negotiation, *Getting to Yes*.²⁷⁶ Two sisters were fighting over an orange. To compromise their positions on asserted rights to the orange, they split it in two. However, one sister wanted to eat the fruit while the other wanted the rind for baking. Thus, each would have gotten more of what they wanted had they focused on their interests rather than their asserted rights.²⁷⁷ The authors use the parable to illustrate the advantages of creative negotiation over either litigation or straight 50-50 compromise.²⁷⁸

Although the illustration is a powerful one and its point well taken, it also confirms the limits of a settlement-directed judicial system. Sometimes both disputants want the fruit. Sometimes disputants have an entitlement for which they should be permitted to assert their rights and have them enforced by the government. Where this is the case, rational parties usually reach a rational accord. However, when this is not the case, decisions must be made and enforced. Thus, in civilized societies, traditional adjudication and its availability continue to form the basis for the continuum of private and public ADR.

Although a multi-door, ADR-enhanced courthouse may fall short of the "justice as a temple" vision, it looks more attractive than standardless, managerial judging; coercively, court-managed negotiation; or judicial blackmail. Under the current system, judges too often practice benign neglect and delayed intervention. Such insufficient, remote, or absent judicial involvement may permit waste, gamesmanship, sharp practices, spoliation, or unfairness. To the extent that court ADR officers will fill some of the current "judging gap," the system will be improved even if the average Arbitration Magistrate is not a Learned Hand.²⁷⁹

²⁷⁶ ROGER FISHER AND WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981).

²⁷⁷ *Id.* at 59.

²⁷⁸ Thus, sharing a trait of Martha Minow's application of the King Solomon parable to judging. See *supra* notes 202-05 and accompanying text.

²⁷⁹ As with Holmes, Brandeis and Cardozo, Hand may be a figure who was a great judge, but would not have been the optimal screener, mediator, or arbitrator. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994) (Hand had difficulty making decisions, was meticulously cautious, in part out of pronounced fear of error, and was slow in

F. Collateral Reforms to Enhance Court-Connected ADR.

Although the judiciary could move to adopt a role as administrator of multi-door ADR without other modifications, the initiative proposed would fare better if additional changes occur. First, in expanding its ADR operations, the judiciary, with the help of Congress and the executive, should alter the law of ADR enforcement so that the "default" option for new ADR is the judicially-administered ADR. Private processing of most new ADR claims should be permitted only in cases of clear agreement or where the private authority provides sufficient guarantees of fairness, access, reliability, and expediency. In short, it should be more difficult to privatize a segment of dispute resolution on the basis of mass edict and boilerplate contract.

Second, civil and criminal adjudication should be separated. The current unification of criminal and civil claims increasingly appears disastrous for the courts. Civil litigants currently take a back seat as criminal matters move to the head of the queue on the basis of the Speedy Trial Act.²⁸⁰ Although one can make a terrific case for repealing the Act and similar state practices giving calendar preference to criminal matters, this is probably both too politically controversial and unlikely to pass constitutional muster even with a "law & order" Supreme Court. However, a separate criminal court would force political-social forces to focus accurately on the costs of the criminal justice apparatus. If faced with the need to install more criminal judges and support staff, decisionmakers will take a hard look at the costs and benefits of various criminal initiatives (e.g., the "war" on drugs), sentencing practices (e.g., mandatory minimums, determinate sentencing), or procedures (e.g., the law of evidence suppression). Although the result might not be a victory for the defense bar (e.g., defendants could lose procedural protections instead of seeing expanded or improved criminal courts), it would focus the issues in clearer relief.

Most important to me (as I admit to more concern over the state of civil litigation), is the possibility that civil justice will improve if it is freed of the need to wait for criminal adjudication, plea bargaining, and sentencing. The matrix through which ADR and settlement proceeds assumes the availability of adequate avenues for adjudication and judicial review. If criminal matters choke the civil docket, these conditions are, at best, imperfectly satisfied and produce a court system more likely to exhibit civil case pathology. Like the need for resource investment, the suggested

rendering decisions).

²⁸⁰ See 18 U.S.C. § 3161 (1994 & Supp. 1995).

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division of criminal and civil courts (and their multi-door options) may be politically unrealistic, but virtually essential for bringing enhanced civil adjudication to fruition. Perhaps my desire to split the civil and criminal functions merely reflects my relatively greater interest in and concern for the civil process. Regardless of the overall court structure, criminal ADR remains a less-explored area, as Judge Weinstein notes.²⁸¹ Certainly, he is correct in criticizing the impact of inflexible sentencing on the judiciary and suggesting that society look for alternative means of policing, punishing, and rehabilitating. However, the most prominent criminal ADR topic of the moment, victim-offender mediation, holds little promise. Recent analysis convincingly argues that the criminal mediation movement manages to simultaneously harm the interests of victims, offenders, and the state.²⁸² Criminal (victim-offender) mediation "diserves the interests of victims by stressing forgiveness and reconciliation before victims have the vindication of a public finding that the offender is guilty," and "suppresses victims' outrage and loss by assuming that these negative feelings can be expressed and resolved in the course of a few hours spent meeting with the offender."²⁸³ It harms offenders "by using selection criteria that are not clearly related to the goals of the program; by eliminating procedural protections such as the right to counsel or rules of evidence; and by using the leverage of pending criminal process to gain advantages for the victim, a private party."²⁸⁴ It "diserves the interests of the state because it devalues the substantive and procedural norms observed in public processes."²⁸⁵

The perhaps trite, but frequently true, public policy yardstick of "three strikes and out" counsels against investing further social resources into this ADR effort, although it can be argued that criminal mediation has a role to play as a voluntary adjunct to prosecution.²⁸⁶ This may be true, but only if criminal mediation is so voluntary and separate from traditional prosecution that it consumes few public dollars for infrastructure or staffing. Applying a standard assessment of the potential usefulness of ADR (which has held sway since at least Sander's famous article), one is immediately struck by

²⁸¹ See Weinstein, *supra* note 1, at 292-94.

²⁸² See Jennifer G. Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

²⁸³ *Id.* at 1249-50, 1273-80.

²⁸⁴ *Id.* at 1250, 1281-90.

²⁸⁵ *Id.* at 1251, 1291-99.

²⁸⁶ *Id.* at 1301-08. A cynic might argue that we already have criminal ADR via plea bargaining, and that this ADR is too standardless and under the potentially arbitrary control of the prosecutor. Although plea bargaining may be problematic, it at least remains under the control of the state and, thus, subject to traditional avenues of democratic control, as well as the professional control of the prosecutor's office.

the absence of encouraging traits. Most criminal matters, particularly random crime, do not involve parties who wish to maintain a functioning relationship. Most crimes do not present close issues of fault and doubt as to the correct rule of law. In cases of intra-family (e.g., physical abuse) or intra-organizational crime (e.g., bribes, theft), mediation may be apt, although forced mediation under such circumstances raises more concerns than even the most ardent feminist might harbor regarding domestic relations mediation.

In many cases, common sense suggests that criminal mediation is a dead end, a point strikingly made by the example of the notorious subway vigilante Bernhard Goetz. Years before his famous subway shooting incident, Goetz was mugged in 1981 by three youths, one of whom was arrested but, "wise in the ways of the criminal justice system," alleged that Goetz had precipitated the altercation. "Because both the attacker and the victim had filed complaints, the victim soon received written notice of an informal hearing at which he could mediate his dispute with the mugger. The victim declined the opportunity."²⁸⁷ The judiciary should not need a great deal of study to determine that it is folly to attempt to apply to muggings the type of ADR that might work for two seventh graders having an altercation during gym class.

G. The Other Side of the Coin: Judicial Lessons for the ADR Community

The courts may have some traits which private ADR organizations may find worth borrowing. Some possibilities include: firm scheduling; more decisionmaker control of fact development; more pre-decision activity; more reasoning and documentation of the rationale for decisions; and more public reporting or equivalents.

1. Firm Scheduling

When faced with an uncooperative opponent, counsel attempting to schedule and proceed to AAA arbitration often feel trapped with a Kafkaesque situation fed by valium. The parties attempt to agree on hearing dates, but schedules rarely coincide. Executives have so many pressing duties that cannot be rescheduled, as do private arbitrators; after all, arbitration is not their prime occupation. After a date is set, an arbitrator or party witness may become "unavailable" (and, of course, no one else could present the company's position with sufficient vigor). International

²⁸⁷ Alschuler, *supra* note 273, at 1808.

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maritime or insurance arbitrations can be even worse.²⁸⁸ The solution to this dilemma seems obvious: private ADR officials should set and keep firm hearing dates, grant exceptions in only the most compelling circumstances, and enter adverse decisions against those who fail to comply. Courts should exercise review deferentially, and hesitate to upset a result (usually an arbitration award reviewed under the auspices of 9 U.S.C. § 10) based on this type of default.

2. More Decisionmaker Control of Fact Development

Streamlined decisionmaking is a wonderful thing, but not if it occurs in a vacuum or is based on distorted information. In many mediations or arbitrations, the contestants should be required to provide sufficient information to one another and the tribunal. Although this carries the potential to saddle ADR with too much litigation-like discovery, modest production requirements (principally document exchange) impose minimum procedural costs and probably have a substantial impact on the quality of substantive outcomes.

3. More Pre-Decision Activity

Just as courts function better by narrowing issues, resolving certain matters on the papers, and planning the presentation of claims, ADR could profit from its own versions of motion practice (e.g., deciding some aspects of claims where facts are not disputed), settlement conferences, and case management. This already occurs much of the time in large cases.

4. More Reasoning and Documentation of the Rationale for Decisions

This should include transcripts, recordings, and similar activity to make and maintain a record for review.

5. More Public Reporting or Equivalents

A frequent criticism of ADR, particularly mass-produced, new ADR of the sort that occurs in the securities industry, is its lack of public reporting.²⁸⁹ Production of "stealth" decisions does not inform the profession or the public of emerging rules, and may impede the predictive

²⁸⁸ For an extreme example of the problem, see Lyons, *Arbitration: The Slower, More Expensive Alternative?*, 11 AM. LAWYER, Jan.-Feb. 1985, at 107.

²⁸⁹ See Poser, *supra* note 66.

and prescriptive function of law. It also tends to advantage insiders.²⁹⁰ Although, through the magic of private incentive, entrepreneurs often step forward when government reporting is absent, this often raises what may be prohibitive access barriers. For example, a well-done *Securities Arbitration Reporter* chronicles securities arbitration, including empirical summary statistics from time to time. Its annual subscription price of several hundred dollars may place it out of the reach of many individuals, and even lawyers and law libraries where securities disputes are not part of everyday activity. Many unsophisticated investors and lawyers may not even be aware of the existence of this publication. Although traditional case reporting is not perfect, standard judicial decisions are generally viewed as adequately available.²⁹¹

III. CONCLUSION

Several years ago, in another symposium, a prominent federal judge wondered whether Courts could become obsolete.²⁹² Predictably, he answered in the negative.²⁹³ He was, of course, almost tautologically correct. Until our vocabulary changes dramatically, we will find it impossible to even discuss dispute resolution without the pole star of the traditional Anglo-American judiciary. Even if new nomenclature replaces traditional labels, the need for an institution that functions much like our courts seems essential so long as American society remains modern, capitalist, rights-based, and individually oriented. Whatever the nomenclature or modifications, something like tribal or totalitarian dispute resolution seems (thankfully) almost impossible to envision.

Absent massive and undesirable social change, courts must continue to be both dispute resolvers and norm articulators. They must operate with sufficient procedural protections, accuracy, fairness, and flexibility to fulfill roles which are likely to expand rather than contract as the world becomes more complex and the body politic resists efforts to expand government

²⁹⁰ See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (finding that government attorneys maintained file of unpublished federal court opinions which were useful in subsequent similar litigation).

²⁹¹ Professor Robel's "disposable opinions" being an obvious and troubling exception. See *id.*

²⁹² See Joseph A. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385 (1992).

²⁹³ *Id.* at 1398 ("Courts are not obsolete—they serve in areas and ways that no other entity can.").

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functions.²⁹⁴ Because we need it to be, justice will continue to be a temple in the vision of most observers. Because resources are limited and other preferences compete with optimal adjudication, justice may be a less accessible temple, or one with substitute arrangements (perhaps a drive-in church). Justice will invariably also have aspects of an assembly line. Justice in the real world thus comprises a mixture of visions that must be intelligently and flexibly applied at least as much as they are debated. Society must both aspire to sound outcomes and realize that a society that eschews the constraints of reality makes the perfect the enemy of the good.

Faced with these conflicting demands and constraints, the proper role of courts is to have more involvement in ADR rather than less, both to preserve the role of the judiciary and to correct the seeming market imperfections of the "new" ADR. The multi-door courthouse is a more promising alternative than either judicial rejection of private ADR or judicial imposition of ADR. This is true because it retains a core of traditional adjudicative activity. In balancing competing considerations, we should opt for a court system that, in debatable cases, elevates its quest for fairness and accuracy above its desire for greater speed or inexpensiveness. Courts should be willing to absorb appropriate aspects of ADR, but ultimately must remain true to the perhaps corny version of justice as the overarching norm. In short, the multi-door courthouse proposed must continue to be, first and foremost, a courthouse.

²⁹⁴ See Weinstein, *supra* note 1, at 294-95.

